86-84

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

NATIONAL BANCARD CORPORATION,
Petitioner,

vs.

VISA U.S.A. INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether a horizontal agreement among Visa's card issuing banks, fixing a discount to the price each will pay for receivables, escapes *per se* condemnation under Section 1 of the Sherman Act, 15 U.S.C. § 1, because it is claimed to promote efficiency?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioner, National Bancard Corporation ("NaBanco"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above proceeding on January 10, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 779 F.2d 592, and is reprinted in the appendix hereto (A 154-211). The opinion of the United States District Court for the Southern District of Florida (Hoeveler, D.J.) is reported at 596 F. Supp. 1231, and is reprinted in the Appendix hereto (A 1-153).

JURISDICTION

The judgment of the Eleventh Circuit was entered on January 10, 1986. The Eleventh Circuit's Order denying NaBanco's suggestions for rehearing *en banc* (A 212-13) was entered on February 18, 1986.

On April 29, 1986, Mr. Justice Powell ordered that the time for filing this petition for writ of certiorari be extended to and including July 18, 1986.

The jurisdiction of this Court to review the judgment of the Eleventh Circuit is invoked under 28 U.S.C. § 1254(1) (1940).

STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976), provides in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

STATEMENT OF THE CASE

A. Visa's Issuer's Reimbursement Fee

In June, 1979, NaBanco filed suit against VISA U.S.A., Inc. ("Visa"), an association of independent financial institutions. NaBanco sought damages and injunctive relief under Section 1 of the Sherman Act, 15 U.S.C. § 1, as a result of Visa's uniform "issuer's reimbursement fee." That fee, which is jointly set by those banks which issue the Visa card, fixes a discount to the price paid by each such issuing bank when it purchases its cardholders'

receivables from merchant banks.[1] The merchant banks, which constitute more than eighty percent of the Visa members, "have no input in determining . . . the existence and amount of the [fixed discount]" (A 163) but are nevertheless required to accept the discounted price. NaBanco is the functional equivalent of a merchant bank. (A 164). At the time NaBanco's appeal was filed, the issuer's fee accounted for annual revenues to issuing banks of more than $300 million. (4:848-51).[2]

In addition to fixing the price paid by merchant banks to issuing banks, the issuer's fee has other significant anti-competitive consequences. For example, the fee sets a floor on the discount charged to merchants by merchant banks because that discount must always be no less than the fixed issuer's fee. (*E.g.*, Px. 1177; 8:1464; 13:2742). Since the issuer's fee is impermissably fixed by joint conduct, this leads to artificially increased prices by merchants who must cover the higher merchant discount rates they are charged. The net result is effectively to preclude certain classes of merchants with low profit margins (*e.g.*, supermarkets) from even accepting Visa cards as well as to artificially affect the price. (*E.g.*, 23:41, 57-58;

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1. Simply stated the system works as follows: a bank (the "issuing bank") issues a card to a consumer for use in retail purchases. Retailers sign-up with banks ("merchant banks") which accept charge slips from the retailers and pay them the amount of the charge less an individually negotiated discount. The merchant bank in turn sells the charge slip (the receivable) to the issuing bank at its face amount, less the discount fixed by Visa. (A 157-59). It is that discount—the issuer's reimbursement fee—which is the subject of this suit.

2. All citations to the Record reference a transcript volume and page number within that volume. For example, 25:96 indicates the Record at volume 25, page 96. All exhibits are referenced in the form, Px. .....

All emphasis in this petition for certiorari is supplied unless otherwise indicated.

8:1488). The issuer's fee gives issuing banks a substantial pricing advantage when competing with merchant banks for merchant business, because the issuing bank does not pay itself a fee on those transactions in which it is both the merchant bank and the issuing bank (so-called "on us transactions"). On the other hand, a merchant bank must pay that fee on 100% of the transactions it processes. (*E.g.*, Px. 1135; 9:1846-48). Further, the fixed nature of the issuer's fee (which generally constitutes about sixty percent of the total merchant bank's cost in handling Visa transactions) dampens any enthusiasm or interest the merchant banks have to innovate or improve productivity. (*E.g.*, Px. 1176; 3:590-92, 594).

B. District Court Proceedings

Following a bench trial, the district court validated Visa's price fixing. The court recognized that Visa's members were not truly joint venturers (since they did not share profits and losses or commingle management functions), and in fact acknowledged that they competed as "independent economic unit[s]" for cardholders and merchants. (A 84). It nonetheless concluded that Visa's horizontal price fixing was not *per se* illegal.

The court reasoned that, under *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 23 (1979) ("*BMI*"), such price fixing was *per se* illegal only where, on its face, it would nearly always tend to restrict "output" rather than "contribute to the creation of 'economic efficiency.'" (A 83). The court believed that a fixed, uniform issuer's reimbursement fee promoted efficiency and the competitive success of the Visa association vis-a-vis other payment mechanisms.

Rejecting the *per se* rule for horizontal price fixing in this case, the district court went on to hold that Visa's fixed fee was valid under the rule of reason because Visa lacked market power in the broad relevant market Visa had urged, consisting of *all* payment systems, including *inter alia*, cash, checks, debit cards, automatic teller machines, traveler's checks and credit cards. (A 106-17).[3] Alternatively, the court held that the same factors which allegedly justified abandonment of the *per se* rule were procompetitive and necessarily outweighed the anticompetitive effects of the fixed price. (A 117-26).

C. Court of Appeals Decision

The Court of Appeals for the Eleventh Circuit affirmed the trial court's decision. The court accepted the district court's finding that the Visa members were not true joint venturers and were in fact separate economic entities in competition with each other. (A 164, 192 & n.16). The court also recognized that, in each of the horizontal price fixing cases after *BMI*, this Court had refused to view *BMI* in "sweeping terms" (A 183-84)—as the district court had done here—and instead had invalidated the price fixing at issue without inquiry as to whether it created efficiencies.[4] The circuit court nonetheless upheld Visa's price fixing. The court held that, since the fee "potentially could create an efficiency enhancing integration to which

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3. This market definition was vigorously opposed by NaBanco, which urged that, at its broadest, the relevant market should have been limited to national, general purpose credit cards.

4. *See* A 183-88 & 184 n.12, discussing non-application of *BMI* in *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984) ("NCAA"); *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982) ("*Maricopa*"); and *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980).

the restraint is ancillary," it could not be considered *per se* illegal. (A 182).

Applying the rule of reason, the circuit court first found Visa's price fixing "reasonable" because Visa lacked "market power" in the broad payment systems market found by the district court. (A 201-05, 209). The circuit court rejected application of this Court's holding in *NCAA* (468 U.S. at 109) that "[a]s a matter of law, the absence of proof of market power does not justify" horizontal price fixing, inexplicably characterizing the Court's language as "cryptic" and "mystifying." (A 202). The court went on to affirm the district court's alternative finding that, in any event, the reasons which justified avoidance of the *per se* rule also validated the fee under the rule of reason. (A 205-09).

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit's Decision Conflicts With Seventy Years of Binding Precedent, Including This Court's Recent Decisions in Catalano, Maricopa and NCAA.

The Eleventh Circuit's decision sanctions horizontal price fixing by competitors who choose to call themselves a joint venture and claim their price fixing "potentially could create an efficiency enhancing integration to which the restraint is ancillary." (A 182). This holding is completely at odds with the decisions of this Court, emasculates the prohibition against horizontal price fixing under the antitrust laws of the United States, and, if allowed to

stand, will open the floodgates to complex, time-consuming full rule of reason trials in nearly every price fixing case where some "joint venture" or "efficiency" claim is asserted.[5] As the *Maricopa* Court put it, an argument that price fixing is not illegal *per se* even where it has procompetitive justifications "indicates a misunderstanding [of the law]. The antcompetitive potential inherent in all price fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some." 457 U.S. at 351; *accord National Society of Professional Engineers v. United States*, 435 U.S. 679, 696 (1978) (Sherman Act "does not support a defense based on the assumption that competition itself is unreasonable").

Despite this Court's plain language, the Eleventh Circuit claimed that it was "without clear standards for determining the application of the *per se* rule in price fixing cases" and that, at the very least, "a factual inquiry into the restraint's competitive effect" was required. (A 168, 186). The circuit court's inability to find a guiding "standard" apparently stemmed from the fact that its reading of *BMI*—as requiring an inquiry into efficiencies—conflicted with this Court's three most recent price fixing cases, each of which, as the circuit court below acknowledged, had refused to examine "whether the [price fixing] agreement accomplished any efficiency creating integration." (A 183-88). Without any clear rationale, the circuit court decided to turn its back on these more recent holdings, and instead to rely upon its own broad reading of *BMI*—a reading it admitted this Court had declined to

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5. It is not too much to say that if there is an "efficiency" loophole in the ban on horizontal price fixing, there would likely be no case in which imaginative counsel could not find some "efficiency" to be litigated.

apply "*to any and all* subsequent applicants." (A 183-84 & n.12).[6]

However, this Court's post *BMI* decisions are neither surprising nor difficult to comprehend. As the Court has gone to pains to point out in each horizontal price fixing case since *BMI*, that case was not to be construed as a haven for price fixing schemes. Nor was it an invitation to litigants to transform all joint price fixing agreements into rule of reason inquiries. To the contrary, in reaching its result in *BMI*, this Court relied on the confluence of a number of unusual factors—none of which is present here. Specifically, *BMI* involved the setting of a price for the blanket licenses offered by the defendants, under which a purchaser acquired the rights to use all the musical compositions of various composers covered by the license. Thus, there was a true joint venture which set the price for a product sold by the joint venture itself—*not* the product of its individual members.[7] Further, if the plaintiff wished to avoid the fixed price, there was a realistic alternative—individual licenses from the composers. 441 U.S. at 24. And the price setting in *BMI* took place against the backdrop of the federal copyright statutory scheme which would be furthered by the activity (441 U.S. at 18-19), and an existing judicial consent decree which authorized the price

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6. The Court gleaned additional support from *Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), an amazing stretch of a case which specifically limited its holding (that rule of reason rather than *per se* analysis should apply) to *non-price, vertical* restraints. *See Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 n.7 (1984) (declining invitation of amici to reconsider the long-standing *per se* rule against vertical price fixing).

7. This Court has subsequently stressed the importance of this distinguishing factor in *BMI*. *NCAA*, 468 U.S. at 113-14; *Maricopa*, 457 U.S. at 355-57.

fixing and effectively precluded members who benefitted from the fixed price from taking their own interests into account in setting it. *Id.* In short, to say *BMI* was unique is to understate the facts.[8]

This Court has, as the circuit court noted, been clear since *BMI* to limit that case to its peculiar facts. In *Catalano,* for example, the defendants had fixed a discount to the price of the product, just as Visa does here. Like Visa, they sought to avoid automatic invalidation of that price fixing by pointing to alleged procompetitive justifications for their arrangement and by relying on *BMI.* However, the *Catalano* Court summarily reversed the Ninth Circuit for its reliance on such justifications. 446 U.S. at 646-47; 457 U.S. at 347-48. As the Eleventh Circuit recognized here, the *Catalano* Court "summarily applied the *per se* rule and disposed of the case without . . . engag[ing] in the [efficiency creating] analysis suggested in *BMI.*" (A 186-87).

This Court's subsequent decision in *Maricopa* was fully consistent with its refusal in *Catalano* to engage in an analysis of purported procompetitive justifications. Once again, the Eleventh Circuit gave lip service to the fact that "[t]he [*Maricopa*] Court . . . indicated that *all price fixing was per se violative even if it created efficiencies.*" (A 187-88); *see Maricopa,* 457 U.S. at 351,

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8. In sharp contrast to the factors in *BMI,* Visa sets the discounted price its individual issuing members—not Visa itself—receive, and does so totally outside the purview of any governmental oversight and without furthering any statutory scheme. There is no realistic alternative to Visa's fixed discount: it directly affects every transaction interchanged through Visa's automated clearing house (the overwhelming majority of Visa transactions; 15:202; 20:20,57), and is the discount generally charged on transactions interchanged outside the Visa system since issuing banks have no incentive to accept a lower discount. (Visa Proposed Finding of Fact 83; *e.g.,* 38:132).

353 n.28. But the circuit court nevertheless disregarded *Maricopa,* holding that Visa's price fixing was not subject to *per se* scrutiny because of its purported efficiency creating potential. (A 188-99).

The *Maricopa* decision is directly on point and squarely controlling here. As Visa conceded in its Eleventh Circuit brief, the fact that "each doctor continued to sell his own services separately" and did not "pool . . . capital and share the risks of loss [and] opportunities for profit" with the other association members (as in a fully integrated joint venture such as a law firm or HMO) was the very reason for the *per se* invalidation of the association's price fixing scheme in *Maricopa.* (Brief of Appellee in the Eleventh Circuit, at 23). That is exactly the situation in the Visa association. Like the doctors in *Maricopa,* the issuing members of the Visa association who fix and receive the issuer's fee admittedly do *not* pool their capital or share the risk of losses associated with the issuance of credit cards. Instead, each issuing bank signs cardholders separately and issuing banks "compete vigorously against one another to issue cards and sign merchants." (A 164). Thus, as in *Maricopa,* the members of the defendant association are competitors, and agreements between them fixing price are, as they have been for seventy years, *per se* illegal.

Interestingly, in *Maricopa,* the Ninth Circuit (like the Eleventh Circuit here) was impressed by the defendants' claim that market imperfections made application of the *per se* rule inappropriate. 643 F.2d 553, 556 (9th Cir. 1980), *rev'd,* 457 U.S. 332 (1982). In particular, the defendants showed that, because the demand and supply curves for medical care were artificially high in relation to a purely competitive industry, medical services and hence

medical insurance would be priced at a higher level in the absence of the fixed price. Upon review, this Court squarely rejected the Ninth Circuit's approach. The Court instead held that any claimed deviance of the demand and supply curves present in the health care industry from a purely competitive model, as well as any effect on the validity of the presumptions which underlie the *per se* rule, could not be asserted as a reason for not applying that rule. 457 U.S. at 350-51. As the Court clearly explained, "claims of enhanced competition are so unlikely to prove significant in any particular case that we adhere to the rule of law that is justified in its general application." *Id.*, at 351. The Court went so far as to state, "[f]or the sake of business certainty and litigation efficiency, we have tolerated the invalidation of some agreements that a fullblown inquiry might have proved to be reasonable." *Id.*, at 344.

In sharp contrast to that reasoning, the Eleventh Circuit has created an unknown and elusive standard for allowing horizontal price fixing to escape the *per se* rule: whether it "*potentially* could create an *efficiency enhancing integration* to which the restraint is ancillary." (A 182). This new rule would, if allowed to stand, open all price fixing cases, which have traditionally been dealt with under the *per se* standard, to full rule of reason inquiry. The potential for mischief is enormous. If price fixing—the most insidious and well recognized form of antitrust violation—were now to be transformed into another excursion into a "reasonableness" inquiry, then the scope and reach of antitrust doctrine would be radically altered. Nothing in the case law or logic supports this result.

Finally, *NCAA* put to rest any lingering doubt whether the *BMI* decision is confined to its unique facts. There again, as the Eleventh Circuit acknowledged, this Court "refused to extend *BMI* to the *NCAA*." (A 184 n.12). In *NCAA*, this Court held that where, unlike here, the case involved an "*industry* in which horizontal restraints on competition are essential if the product is to be available at all," a defendant should be allowed to attempt to carry its "heavy burden of establishing an affirmative defense which competitively justifies this apparent deviation from the operations of a free market." 468 U.S. at 101, 113. Of course, in that case, the burden was not satisfied since the NCAA was setting the price to be paid to the *individual* members for their games (*id.* at 113) —just as Visa sets a discount to the price paid by individual issuing banks.[9]

To summarize briefly, the decision below is not merely wrong; it is, we submit, dangerous. By permitting price

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9. Moreover, there is no question that the payment mechanism industry does *not* require horizontal restraints on competition for their products to be available. National, general purpose credit cards—the same type of payment mechanism as Visa provides—have been and continue to be offered by single entities, including in some cases by individual Visa members (*e.g.*, the Choice card and Carte Blanche card by Citibank, a Visa member; the Discover card by Sears; the American Express card). (A 108-09; 4:868-69; 23:88-89).

The fixed fee is also unnecessary to the offering of Visa cards. The district court accepted Visa's argument that the fixed fee promoted "universality of acceptance"—*i.e.*, the acceptance by each issuing bank of its cardholders' paper without demanding an exorbitant discount. However, it is facially obvious that "universality of acceptance" would also have been achieved, for example, by a rule requiring card issuing members to accept their cardholders' receivables upon presentment, without also fixing a discount—in favor of the issuing banks—to the receivables' face amounts.

fixers to evade the *per se* rule by merely invoking the rubric "joint venture," or by positing so-called potential efficiencies, the Eleventh Circuit's decision in this case poses a severe threat to the long standing proscription on price fixing. Indeed, the Eleventh Circuit has said and done what no court has. Claiming it is "without clear standards for determining the application of the *per se* rule in price fixing cases," that court has taken it unto itself to fashion its own test, namely, whether the conduct "potentially could create an efficiency enhancing integration." That amorphous, open-ended standard, which ignores the teaching of *Catalano*, *Maricopa* and *NCAA*, would (if accepted) lead to the kinds of "defenses" to charges of price fixing which this Court laid to rest long ago. *See, e.g., United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927). Accordingly, the decision should not be allowed to stand.

CONCLUSION

For the above reasons, petitioner respectfully submits that this petition for writ of certiorari should be granted.
Dated: July 18, 1986

Respectfully submitted,

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NATIONAL BANCARD CORPORATION
(NaBANCO), a Florida corporation,
Plaintiff,

v.

VISA U.S.A., INC., Defendant.

No.79-6355-CIV-WMH.

United District Court,
S.D. Florida,
Fort Lauderdale Division.

Sept. 20, 1984

MEMORANDUM OPINION AND FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

This case involves a claim by plaintiff, NaBanco that defendant, VISA has violated the Sherman Antitrust Act, causing plaintiff damages. Defendant issues the VISA card, used by many as a method of payment for goods and services, in connection with the transfer of transaction paper from a merchant through its bank to the card issuing bank. VISA

regulations call for payment of an interchange fee ("IRF") if its exchange system is used. The interchange fee is set by the VISA Board of Directors. Plaintiff, among other things, asserts that the methods of setting and determining the interchange fee involves price fixing and are anti-competitive. Defendant asserts that the setting of the fee is reasonable, not only in method but in amount, and further that the VISA regulations encourage competition and are not in violation of the Act. The Court has determined that the plaintiff, NaBanco has failed to prove its case and that judgment shall be entered in favor of the defendant, VISA.

The last 150 years have witnessed the evolution of several distinct methods of payment for goods and services. Just as we once moved from an economy which relied heavily on barter as a primary means of

exchange to an economy based on cash, so we now find ourselves increasingly becoming a "cashless" society. Today it is not unusual to find major sectors of the buying public forsaking cash in favor of credit cards[1] and, even more recently, debit cards.[2] Unlike consumer currency purchases, however, these newer payment forms leave a residue of paper credits and debits which must somehow be cleared in order to complete a particular consumer transaction.

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[1] The term "credit card" is actually a misnomer. Not all so-called credit cards authorize the issuance of "credit," i.e., an opportunity to pay off amounts owed over an extended period of time at some rate of interest. To the extent that any credit card does not require a cardholder to pay for a purchase at the point of sale, however, a "free" or "convenience use" period is endemic to all credit card systems.

[2] A "debit" card typically accesses a cardholder's asset account at the card-issuing bank although a line of credit may be available as "overdraft" protection when the account balance reaches zero.

Like any major economic transition, the movement from cash to cashless payment systems is not without growing pains. This case is itself evidence of the fact that social or economic change often leaves in its wake those who feel aggrieved by the process. National BanCard Corporation ("NaBanco") brought this action against VISA U.S.A., Inc.[3/] and the members of the VISA Board of Directors (hereinafter referred to collectively as "VISA") for alleged violations of Section 1 of the Sherman Act, 15 U.S.C. § 1. In its complaint

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3/ VISA is a member of VISA International, which administers the VISA system worldwide. Through VISA International, the VISA card is honored in 120 countries and has 100 million cardholders and 3 1/2 million merchants worldwide. Cards issued by members of VISA are accepted internationally, and cards issued by members of VISA International outside the U.S. are accepted by merchants in the U.S. With the consent of the parties, the issues and discovery in this case were limited to activities in the United States. Russell TR.5-6 1/16/84.

NaBanco alleged a continuing combination and conspiracy by VISA to fix and maintain the price paid for bank credit card "interchange" transactions. For this claimed offense NaBanco sought damages in excess of three million dollars, trebling of damages, injunctive relief, attorneys' fees, and costs. Jurisdiction of this court was invoked pursuant to Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, and pursuant to 28 U.S.C. § 1337.

The case was tried by the court without a jury. It began May 10, 1982 and, to accommodate the pressing criminal docket of the Southern District of Florida, continued in segments of one or more weeks until its conclusion in January of 1984. The total trial time was in excess of nine weeks during which the court reviewed thousands of pages of exhibits and heard in person or by deposition dozens of witnesses, experts

and otherwise. Based upon this record, and for the reasons enunciated below, the court finds that plaintiff NaBanco has failed to prove any of the alleged antitrust violations with which it has charged VISA.

THE BANK CREDIT CARD INDUSTRY

The issues raised in this case can best be defined and understood in the context of the bank credit card industry and its history.

In the early 1800's, the two principal means of commercial transactions payment devices were bank notes issued by state banks and drafts.[4/] These payment forms satisfied the needs of commerce at a time in history when consumers and merchants would usually reside and do business in the same geographical area.

4/ Wm. F. Baxter, Bank Interc' ange of Transactional Paper: Legal and Economic Perspectives, The Journal of Law & Economics, Vol. XXVI (3) Oct. 1983, p. 556.

Accordingly, payment media rarely had to be sent beyond the local area. Bank notes, issued by the local bank or banks, circulated through the immediate region and were used to a far greater degree than currency is used today. In the larger local transaction, and also in the relatively infrequent long-distance transaction, the draft was the typical medium used.5/

However, rapid technological changes in both transportation and communication in the mid-1800's, heightened the need for a medium of exchange which was acceptable

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5/ Id. at p. 557. If a consumer became indebted to a distant merchant, the consumer would execute payment by purchasing a draft from his local bank made payable to the merchant as payee. The draft would instruct the merchant's bank to make payment to the merchant in the amount of the indebtedness. For this, the consumer paid a substantial fee. If the consumer maintained a payments balance with the bank, this sum would be debited from the account. If not, the consumer's would be obligated physically to transport to the merchant bank a mutually acceptable form of currency.

to diverse and unknown persons across the country and which could travel easily and cheaply. The check was increasingly employed to meet these needs.6/

Despite the check's utility, other payment devices arose to meet more specific consumer needs. About a century after the check gained common acceptance, the bank credit card was introduced. The chief antecedents of this card were the retail merchant's "open book" account7/ and the somewhat later-developed but more

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6/ Id. at p. 560. The consumer would send the check to the distant merchant who presented it at his bank for collection. When the bank accepted the instrument for collection, it might credit the merchant's account immediately or await payment by the consumer's bank. The check itself was sent via a number of correspondent banks to the consumer's bank, where the consumer's account was debited that amount upon arrival of the check.

7/ Id. at p. 572. A form of short-term, interest free credit to customers whose patronage is highly valued. These customers tend to be persons whose time costs are high, who shop regularly at a particular retail outlet in high volumes, often buying more higher priced items.

closely-analogous "travel and entertainment" cards.8/ Unlike either of its two predecessors, however, the bank credit card has come to play a much more versatile role in the universe of payment systems. The bank credit card provides many of the same services as the personal check, but, in addition, provides retailers of goods and services an extra measure of protection from the risk of default. Incident to the system, and in most cases, the banks, not the retailers, are responsible for seeking payment from the retailers' customers.

8/ Id. at 572-73. Travel and Entertainment cards. ("T & E Cards") Developed as an answer to an increasingly mobile post-WWII society. The issuing organization (notably American Express and Diners Club) signs up merchants across the country of the type frequently patronized by travelers: hotels, resorts, restaurants, and a small number of prestigious retail outlets. Annual fees are normally much higher than those charged for the VISA or MasterCard and the system as a whole tends to cater to more "upscale" clientele.

As in the case of the check, the bank credit card system is principally a four-party payment arrangement. It involves: (1) cardholders who use bank credit cards to purchase goods and services; (2) merchants who accept bank credit cards in exchange for goods and services; (3) financial institutions (issuer banks) which issue cards to, and contract with, cardholders; and (4) financial institutions (merchant banks) which contract with merchants to accept the bank credit card and thereafter manage the bank credit card accounts of these merchant clients.

A typical transaction can be most simply described as follows: Once a potential consumer has opened a bank credit card account with a particular issuing bank, he or she may use that bank credit card in lieu of cash to purchase goods and services from any merchant

participating in that particular bank credit card system. The merchant, after a sale, then transmits the consumer/cardholder's draft evidencing this transaction (referred to in the parlance of the industry as "paper") to its merchant bank, this sum being immediately credited to the merchant's account minus a small charge agreed upon earlier by contract (called the "merchant discount"). If the merchant bank happens to be the same bank which issued the card, the consumer/cardholder's account in the bank will be processed "in-house" in what has been described as an "on-us" transaction. When the issuer bank differs from the merchant bank, the process becomes more complicated. First, the merchant bank sends the transactional paper to the issuer bank. The issuer bank then will either send the merchant bank the requisite sums due and owing from its

cardholder, or will directly credit the merchant bank's account at the issuer bank, if the merchant bank has such an account. In either case, the issuer bank is ultimately responsible for the sums due and owing from its cardholders, and thus, absent a breach of agreed procedure by the merchant or merchant bank, the issuing bank bears the risk of default by the cardholder.

The process by which transactional paper is moved from the merchant bank to the issuer bank involves certain costs. In the system at issue here, the issuer bank withholds a small amount (called the "interchange fee") from the monies due and owing the merchant bank to cover the costs of this processing. Even more simply stated, the merchant bank (if not the issuer of the card used in a sale) must process the paper generated by the sale to realize both the small profit hopefully

provided in the merchant's discount charge to the retailer and reimbursement for the sale amount credited to the account of the retail merchant. The paper then goes to the issuer bank which reimburses the merchant bank but only after the deduction of the interchange fee. This interchange fee is the subject of the dispute in this case.

THE PARTIES

The VISA System: Its History and Its Product

One of the most successful three-party bank cards was the California-based Bank of America's ("BA's") local prototype credit card program, the BankAmericard. This program expanded in 1960 to a statewide system to take advantage of the ever-increasing pool of people amenable to credit card use within the state. This expansion increased the base over which the costs of the system could be spread.

Still, the nationwide expansion of its principal competitor's operations (travel and entertainment cards) in conjunction with dramatic technological changes in data-processing and electronic communications soon led BA to develop its own national credit card program in 1966.

The BA network was achieved by means of a franchise program which permitted BA-licensed local banks across the country to issue credit cards bearing the BankAmericard name. The licensee banks actually owned the credit cards they issued, and created their own receivables by signing up local merchants who would accept the card. Licensees were also encouraged to engage other non-issuer banks as their agents to expand the merchant base still further.

With the advent of the BankAmericard licensing program came the concept of the interchange fee, referred to earlier as a

means of paying for costs associated with transferring transactional paper. Included in the licensing agreement was a provision indicating the sum or "fee" licensees were entitled to receive when purchasing their cardholders' paper in interchange. The agreement provided that the merchant-servicing licensee had to send to the card-issuing licensee either the actual merchant discount earned in each interchange transaction, or the merchant bank's "average" merchant discount. (Emerson TR. at 54. 1/13/84); Russell TR. at 15. (1/16/84); Exh. 2007.

Between 1966 and early 1970, many of the BA licensees grew in size and expertise and accordingly moved for the creation of a system which could more accurately reflect their individual interests and concerns, as well as address some of the more pressing problems facing the licensees system. (Larkin, TR. 232-

33; (1/11/83). These concerns led to the formation of NBI, a for-profit, non-stock-membership corporation which was established in 1970.

Along with the formation of NBI came a new conceptual model for the interchange fee. The new fee was adopted by the NBI Board of Directors in 1971, in response to serious problems of uncertainty and instability which the old fee system could not resolve since it was based upon each merchant bank's interpretation of how much was due and owing to issuer banks. The new, uniform fee was based upon a cost-reimbursement methodology developed in conjunction with Arthur Anderson and Co., the national accounting firm, and was called the "Issuer's Reimbursement Fee" (hereinafter referred to as "IRF"). This fee or charge reflected the concept of calculated reimbursement.

In 1977, NBI changed its name to VISA and exclusive rights to the name "BankAmericard" reverted to BA. To become a VISA member, of which there were approximately 13,400 in 1983, a financial institution must be eligible for federal deposit insurance. Upon proper application, any eligible institution can serve either as a proprietary member or as an agent of a proprietary member. There were 1866 proprietary members in 1983. Each can perform the function of issuing cards to cardholders and of signing merchants to participate in the VISA system. Proprietary members also elect VISA's governing Board of Directors which makes the rules under which the system operates. Agent members, 11,537 strong in 1983, elect only to contract with merchants on behalf of proprietary members; they are not eligible to vote for

Board members and therefore do not play as significant a role as proprietary members in determining VISA policy.

It is important to understand that at all times material to the claims in this case, VISA did not require its participating members to interchange paper through the VISA system. Rather, members could elect to exchange transactional paper pursuant to separately negotiated agreements with other members without the imposition of an exchange fee by the VISA system. If, however, members choose instead to interchange their paper through VISA, the data on the paper will be sent in electronic form by the merchant bank (or its processing agent) through what is known as the VISA Base II computer system to the issuer bank (or its processing agent). It is only when members use BASE II to interchange their paper that interchange will be governed by the highly

complex set of VISA Operating Regulations, which includes the IRF and other rules governing the conditions under which issuer banks are required to "purchase" transactional paper from merchant banks.

NaBanco

Plaintiff, NaBanco, formed under the name Southern Bankcard Corporation in 1974, is neither a proprietary nor an agent member of VISA. It is not eligible for VISA membership because it is not a financial institution eligible for federal deposit insurance. It participates in the VISA bank credit card business by contracting with various VISA members to serve as their processing agent, thereby obtaining access to the VISA Base II system.

In its capacity as an agent for a VISA member, NaBanco typically performs activities similar to those performed by merchant banks, such as providing

authorization services and services relating to the processing of merchant transactions.9/ The majority of NaBanco's business is with VISA members who have already negotiated and contracted with particular merchants. Bull TR. 670-72 (5/13/82). NaBanco then provides its services pursuant to the contract it has with the VISA member, ordinarily electing not to be paid a transaction fee for such services but to receive instead most or all of the merchant discount revenues that merchants would otherwise remit to the VISA member. In return for these merchant discount receipts, NaBanco agrees to discharge the VISA member's obligation to pay the IRF whenever sending data in interchange through VISA's Base II system.

9/ In a few instances, NaBanco has also served as an agent of a VISA member on the card issuing side. As a result, NaBanco "receives" IRF in the same sense that it sends it out; re, under the contract it negotiated with the VISA member. Exh. 515. Bull Tr. 752-56 (5/13/82).

Bull TR. 336 (5/11/82) Exh. 6. Nevertheless, under VISA's rules, the VISA member continues to remain legally liable to VISA for payment of the interchange fee on all such transactions.

In a minority of cases, NaBanco, on behalf of VISA members, negotiates directly with merchants regarding merchant discount rates and other terms of the services to be provided to them. In this capacity, NaBanco competes with nearly all of the VISA members, and testimony both from merchants and from VISA members indicates that NaBanco is one of the leading contenders for the business of major retailers nationwide.10/

10/ NaBanco describes itself as the "premier non-bank third party credit clearinghouse." Ex. 361. During 1976-1980, NaBanco's revenues went from $1 million to $9 million. In that same period, its earnings increased from $69,000 to $565,000. Among the major merchants for whom NaBanco is the processor are County Seat Stores, Eckerd Drugs, Waldenbooks, and Petrie Stores, and (footnote continued)

THE NATURE OF THIS ACTION

Among other bases for plaintiffs charges of antitrust violations by defendant, plaintiff contends that the interchange fee requirement (when processing through BASE II) diminishes its ability to compete for merchant business on an equal basis with VISA member banks which do both issuing and merchant business. The "on-us" transaction (where the card issuing bank and the merchant contracting bank are the same) does not present the need for interbank exchange. Thus, says NaBanco, these proprietary members of VISA - who have co-operated in mandating the interchange fee in non "on-us" transactions, have curtailed its ability to compete.

(footnote continued from previous page) many major department stores, including Burdines' and Rich's. Bull TR. 1052-61 (9/13/82) Exh. 2199.

"On-us" transactions occur with the greatest frequency in the immediate geographic vicinity of a VISA member bank (especially where that member is a large card issuer) since it is in this area that a local merchant is most likely to have an account with the same bank as an area resident/cardholder.

NaBanco argues that in order to compete effectively with VISA member banks, it has had to develop relationships with merchants outside its immediate geographic market and find retailers with sufficient locations, or a broad enough customer base, so that the effects of "on-us" transactions are eliminated or at least minimized. Bull TR. 249 (5/11/82). NaBanco also claimed it has found it necessary to sign up merchants in the United States who cater to tourists whose cards have been issued outside the United States. Alternatively, NaBanco argued it

has had to establish agency relationships with banks outside the United States since the interchange fee charged on international transactions has traditionally been less than that charged for domestic exchanges. Bull TR. 275-277 (5/11/82).

Nonetheless, NaBanco has claimed it can cite numerous examples of its inability to compete with VISA member banks for merchant contracts due to the competitive advantage these banks enjoy from "on us" transactions. Give the fact that both "on-us" and IRF transactions involve many of the same types of processing costs whether they occur "in-house" or not, NaBanco has questioned the intent of VISA in setting particular IRF levels. Specifically, NaBanco has contended that IRF is not cost-related

and, therefore, is either unnecessary or set intentionally high so as to discourage competitors such as NaBanco.

In the NaBanco scenario, individual merchant banks compete with it to sign up and serve merchants but unfairly so when they are also in the position of issuer banks because in this latter sense they act like a group of competitors who have conspired to sell goods to one another (actually to themselves) at a lower rate than the one offered NaBanco as a non-issuer bank thus affecting the price at which NaBanco can offer its merchants services. Since NaBanco believes that individual issuer and merchant banks can and should negotiate with one another over the price to be paid for transactional paper, VISA member banks, says NaBanco, are nothing more than a group of competitors whose setting of IRF is akin to horizontal price-fixing for

transactional paper and, therefore, such conduct is absolutely proscribed by Section 1 of the Sherman Act.

In terms of remedies, NaBanco has asked that this court enjoin VISA from setting IRF at any level other than "par" (zero) so that financial institutions with large numbers of "on-us" transactions will have no competitive edge over entities like NaBanco which have few or none. Essentially, NaBanco has asked the court to "fix" its own price for IRF but in accordance with terms NaBanco considers fair. Alternatively, NaBanco has asked the court to enjoin VISA from setting any particular IRF, thus permitting each merchant bank (or NaBanco) to establish individually-negotiated "IRFs" with issuer banks. In addition, NaBanco has sought over three million dollars in damages,

trebled, to compensate it for the several years during which it paid IRF to its alleged detriment.

STANDING TO SUE

Before reaching any of NaBanco's antitrust arguments, it is necessary to address defendant VISA's argument that NaBanco lacks standing under the antitrust laws to bring its action. Since NaBanco brought this action seeking both damages and injunctive relief, and since the standards for standing differ as to each, two separate but related standing analyses follow.

Standing to Bring The Treble Damages Claim

Under Section 4 of the Clayton Act, "any person . . . injured in his business or property by reason of anything forbidden in the antitrust laws" may recover treble damages plus costs and

attorney's fees. 15 U.S.C. § 15.[11]/ The Supreme Court has stated that § 4 on its face contains little in the way of restrictive language, but has read the "by reason of" language cited above as encompassing several separate and analytically distinct elements, each implying that the statute is not as broad as its words suggest.

Neither courts nor parties to antitrust actions have been scrupulous in their attempts to keep the various restrictions on a plaintiff's right to a treble damage action separate and distinct. All seem to agree that a plaintiff must initially establish the existence of a causal connection between defendant's antitrust violation and plaintiff's injury. McClure v. Undersea

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11/ There is also a "commerce clause" requirement under Section 4; however, the parties have already stipulated to the fact that the practices examined in this case affect commerce.

Indus., Inc., 671 F.2d 1287, 1289 (11th Cir. 1982), cert. denied, 460 U.S. 1037, 103 S.Ct. 1427, 75 L.Ed.2d 788 (1983)("The term 'fact of damage' refers to causation and simply means 'that the antitrust violation cause injury to the antitrust plaintiff.'" (quoting Alabama v. Blue Bird Body Co., Inc., 573 F.2d 309, 317 (5th Cir. 1978).)). Once the causal connection between plaintiff's injury and defendant's act is shown, however, the courts begin to differ about what additional elements a plaintiff must prove in order to successfully bring a treble damage action.

The cases suggest there are at least two, perhaps three, additional requirements for standing to maintain a treble damage action. The first of these requirements takes many forms, as most courts vacillate between the two alternative techniques of (a) measuring

the directness of the injury complained about and (b) asking whether the plaintiff falls within the target area of the violation. The second requirement, which some courts do not distinguish from the standing requirement, is that an antitrust plaintiff must prove he has suffered "antitrust injury," as defined in Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977); i.e., injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.12/ Finally, some plaintiffs must also address the issue of defensive and offensive use

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12/ "The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be the 'type of loss that the claimed violations . . . would be likely to cause.'" 429 U.S. at 489, 97 S.Ct. at 697 (emphasis in original)(quoting Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 125, 89 S.Ct. 1562, 1577, 23 L.Ed.2d 129 (1969)).

of "pass-on" damages, considered by the Supreme Court in Hanover Shoe v. United States Mach. Corp., 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968) and Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977). For the most part, courts deal with this last issue in conjunction with their discussions of the standing argument, perhaps because of a dearth of Supreme Court opinions delineating the standing requirement; however, it is important to note that neither Hanover Shoe nor Illinois Brick are "standing" cases per se. Therefore, to the extent the policies these cases promote are relevant to a discussion of a plaintiff's right to bring a treble damage action and are not addressed in a court's discussion of a plaintiff's "standing" to bring such an action, they must be separately considered.

Tests for Standing

Lower federal courts have adopted various tests for antitrust "standing" to preclude suits by plaintiffs considered too remote from the alleged violation to be entitled to recover damages. Some cases have applied a "direct injury" test of standing which focuses on the relationship between the plaintiff and the alleged antitrust violator. Repp v. F.E.L. Publications, Ltd., 688 F.2d 441, 444-45 (7th Cir. 1982); Malamud v. Sinclair Oil Corp., 521 F.2d 1142, 1149 (6th Cir. 1975); In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 127 (9th Cir. 1973), cert. denied, 414 U.S. 1045, 94 S.Ct. 551, 38 L.Ed.2d. 336 (1973). Generally, a plaintiff separated from the violator by one or more intermediate tiers of victims lacks standing under the direct injury test because, by analogy to tort law, the

injury received is too remote to be fairly characterized as proximately resulting from the defendant's antitrust violation. Today, no circuit continues to apply a strict "direct injury" test. Instead, courts borrow from the language of that analysis, as well as from that of Hanover Shoe and Illinois Brick, to discourage or dismiss suits brought by plaintiffs whose injuries result from chains of events too speculative to justify treble damages. In essence, this is the position taken by VISA in arguing that NaBanco is not a "direct purchaser" of IRF and is therefore not eligible to recover overcharging damages. Only the merchant banks with which NaBanco contracts or, alternatively, the merchants themselves, are direct enough purchasers of IRF to be eligible to sue under Section 4 according to VISA. There is some support for VISA's position in cases which have held, based in part on

the policies underlying Illinois Brick, that a plaintiff who purchased from a non-conspiring competitor of horizontal price-fixing defendants may not recover damages on the theory that the company from which it purchased charged an artificially inflated price under the "umbrella" of the defendant's price-fixing conspiracy. Mid-West Paper Prods., 596 F.2d 573, 587; In re Folding Carton Antitrust Litigation, 88 F.R.D. 211, 219-20 (N.D. Ill. 1980); In re Petroleum Prods. Antitrust Litigation, 497 F.Supp. 218, 227-228 (C.D. Cal. 1980), aff'd on other grounds, 691 F.2d 1335 (9th Cir. 1982); Liang v. Hunt, 477 F.Supp. 891, 896-97 (N.D. Ill. 1979); cf. In re Petroleum Prods. Antitrust Litigation, 691 F.2d 1335, 1341 (9th Cir. 1982) (Illinois Brick bars umbrella claim in the context of a multi-tiered distribution chain).

The other test popular among courts and, as NaBanco is quick to point out, routinely employed in this Circuit, focuses on the nature of the antitrust violation and the plaintiff's relationship to the area of the economy claimed to have been injured by the defendant's conduct. Const. Aggregate Transport v. Florida Rock Ind., 710 F.2d 752 (11th Cir. 1983); Litton Sys.,Inc. v. American Tel. & Tel. Co., 700 F.2d 785, 821 (2d Cir. 1983); Aurora Enters., Inc. v. National Broadcasting Co., 688 F.2d 689, 692-93 (9th Cir. 1982); In re Municipal Bond Reporting Antitrust Litigation, 672 F.2d 433, 435-36 (5th Cir. 1982); Engine Specialties, Inc. v. Bombardier Ltd., 605 F.2d 1, 12-15 (1st Cir. 1979), cert. denied, 446 U.S. 983, 100 S.Ct. 2964, 64 L.Ed.2d 839 (1980); see also Cleary v. Chalk, 488 F.2d 1315, 1319 n. 17 (D.C. Cir. 1973), cert. denied, 416 U.S. 938, 94

S.Ct. 1940, 40 L.Ed.2d 289 (1974) (citing decisions under the target area standard without expressly adopting that test). Called the "target area" test, it requires the plaintiff to establish that he was "within that section of the economy . . . endangered by a breakdown of competitive conditions in a particular industry" and that the illegal practices were aimed at him. Jeffrey v. Southwestern Bell, 518 F.2d 1129, 1131 (5th Cir. 1975). See also Yoder Bros., Inc. v. California-Florida Plant Corp., 537 F.2d 1347 (5th Cir. 1976); see also Southern Concrete Co. v. United States Steel Corp., 535 F.2d 313 (5th Cir. 1976); Buckley Towers Condominium, Inc. v. Buchwald, 533 F.2d 934 (5th Cir. 1976).

Unfortunately, courts which have used a target area analysis to determine antitrust standing have never agreed on the general requirements of the test,

sometimes resulting in apparently inconsistent conclusions. This situation led the Court in Yoder Bros., supra, 1360, to comment: "A test focusing on the sector of the economy is more stated than applied." Similar kinds of problems in applying the "direct injury" test have led the Third Circuit, as well, (and to some extent the Eighth Circuit; Paschall v. Kansas City Star Corp., 605 F.2d 403, 409-10 (8th Cir. 1979)) to reject both tests in favor of a case-by-case approach called the "factual matrix" test. Cromar Co. v. Nuclear Materials & Equipment Corp., 543 F.2d 501 (3d Cir. 1976). The Sixth Circuit has adopted for antitrust matters the test employed for determining standing in administrative law cases, i.e. requiring the plaintiff to show that its affected interests arguably are within the "zone of interests" protected by the antitrust statutes. Malamud v. Sinclair

Oil Corp., 521 F.2d 1142, 1148 (6th Cir. 1975); see also Chrysler Corp. v. Fedders Corp., 643 F.2d 1229, 1234 (6th Cir. 1981), cert. denied, 454 U.S. 893, 102 S.Ct. 388, 70 L.Ed.2d 207 (1981).

At the heart of the Third Circuit's "factual matrix" test is a recognition of the reason for the existence of different Section 4 requirements; i.e., the multifaceted problem of determining when a person is sufficiently "injured in his business or property by reason of anything forbidden in the antitrust laws" so as to be eligible to sue for treble damages. Thus, the Mid-West Paper Prods. court concluded that only together do the separate Section 4 requirements "constitute the judicial gloss upon the words of § 4 by which the courts have patrolled the portals to a treble damage action." Mid-West Paper Prods., supra, 582. Citing the observation of the

Supreme Court in Hawaii v. Standard Oil Co., 405 U.S. 251, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972), that underlying the precepts that guard access to Section 4 is the recognition that the treble damage action represents a congressional determination that the antitrust laws be enforced in large measure by "private attorneys general" who are encouraged to sue by the prospect of recovering three times their actual damages, the Third Circuit went on to say: Accordingly, whether the issue is the definition of injury in § 4, or the use of pass-on theories, or the proper scope of the standing doctrine, the line drawing that necessarily takes place is informed by an inquiry into what posture best effectuates the duel purposes of the treble damage remedy, namely, compensating victims of antitrust violations for their injuries and deterring violators by depriving them

threefold of "the fruits of their illegality," while at the same time furthering the overriding goal of the antitrust laws - preserving competition. Mid-West Paper Prods. at 583 (quoting Hawaii v. Standard Oil Co., 405 U.S. 251, 262, 92 S.Ct. 885, 891, 31 L.Ed.2d 184 (1972)). Aside from these basic objectives of antitrust enforcement, ". . . additional concerns must be addressed in determining whether antitrust goals would be furthered by adopting a particular position. Among such concerns are whether a duplicative or ruinous recovery will result and whether resolution of the claim will unduly complicate the trial by necessitating the pursuing of complex and conjectural economic lines of causation and effect." (citations omitted).

This court could certainly do worse than to adopt these principles as its own in deciding whether or not NaBanco has

standing to bring its treble damage action. This is not to say this court adopts the "factual matrix" test used by the Third Circuit. Neither, however, does the court feel bound by the dictates of the target area test as NaBanco urges. The Eleventh Circuit in Construction Aggregate Transport (supra) may have been correct in characterizing the Supreme Court's decision in Blue Shield of Virginia v. McCready, 457 U.S. 465, 102 S.Ct. 2540, 73 L.Ed.2d 149 (1982) as implicitly sanctioning continued, flexible use of the target area test. The two recent Supreme Court decisions which have even addressed the standing issue, Blue Shield and Associated Gen. Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983), while never going so far as to adopt any particular test,

have acknowledged their existence as tools to be employed by courts to determine standing, as such tests are useful.

Nevertheless, the Associated Gen. Contractors case, following on the heels of Blue Shield, seems to have gone further than Blue Shield in not only refusing to adopt any of the particular tests used by various circuit courts but in actually delineating the skeleton of a new standing test for treble damage actions. The Supreme Court observed, in reference to different standing tests, that "these labels may lead to contradictory and inconsistent results." Associated Gen. Contractors, supra. Likening the task of federal judges to articulate a precise test to determine antitrust standing in treble damage actions to the struggle of common-law judges to announce a precise definition of the concept of "proximate cause," the Supreme Court emphasized the

virtual impossibility of announcing a "black-letter rule that will dictate the result in every case," in light of the infinite variety of claims that can arise in the antitrust context. Id., 459 U.S. at 537, 103 S.Ct. at 908, 74 L.Ed.2d at 737. Instead, the Supreme Court suggested that courts "analyze each situation in light of the factors set forth" in its analysis of the plaintiff's standing position in the case before it. Id. 103 S.Ct. at 908 n. 33.

In light of its opinion in Associated Gen. Contractors, the Supreme Court vacated and remanded two appeals court decisions for further consideration,13/ and, following that lead, several courts

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13/ See, Industrial Inv. Dev. Corp. v. Mitsui & Co., 671 F.2d 876 (5th Cir. 1982), vacated, 460 U.S. 1007, 103 S.Ct. 1244, 75 L.Ed.2d 475 (1983), on remand, 704 F.2d 785 (5th Cir. 1983); Ostrofe v. H.S. Crocker Co., 670 F.2d 1378 (9th Cir. 1982), vacated, 460 U.S. 1007, 103 S.Ct. 1244, 75 L.Ed.2d 475 (1983).

have concluded that the Associated Gen. Contractors opinion requires rejection of standing tests previously adopted by the courts of appeals. See Southaven Land Co. v. Malone & Hyde, Inc., 715 F.2d 1079 (6th Cir. 1983); see also Meyer Goldberg, Inc. v. Goldberg, 717 F.2d 290 (6th Cir. 1983); Merican, Inc. v. Caterpillar Tractor Co., 713 F.2d 958 (3d Cir. 1983); Indium Corp. of Am. v. Semi-Alloys, Inc., 566 F.Supp. 1344 (N.D.N.Y. 1983); Chelson v. Oregonian Publishing Co., 715 F.2d 1368 (9th Cir. 1983). The Eleventh Circuit in Construction Aggreg. (supra) while citing the Supreme Court's Associated Gen. Contractors decision, did not expressly consider the effect of that decision on the continued validity of the target area analysis. Thus, the scope of Construction Aggreg. as it relates to this question

limits its application to the facts of this case. Associated General Contractors, supra, at 908 n.33.

Whether or not Associated General Contractors truly represents a new standard for antitrust "standing," or is rather a purely sematical argument, this court adopts its language as the most thorough pronouncement of the Supreme Court to date on the standing issue in treble damage actions. At its core, Associated General Contractors admonishes us "to evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them" in the context of common-law damages litigation in 1890. 459 U.S. 519, 535, 103 S.Ct. 897, 907, 74 L.Ed.2d 723, 736. As guideposts for this evaluation the Court pointed to "previously decided cases [which] identify factors that circumscribe and guide the exercise of judgment in

deciding whether the law affords a remedy in specific circumstances." 459 U.S. at 537, 103 S.Ct. at 908, 74 L.Ed.2d at 737. In light of the facts before it the Supreme Court found at least two factors favoring judicial recognition of the plaintiff's antitrust claim: (1) a causal connection and (2) intent to harm, although as to this latter factor the Supreme Court reiterated its Blue Shield holding that "[t]he availability of the § 4 remedy to some person who claims its benefit is not a question of the specific intent of the conspirators." 459 U.S. 537, 103 S.Ct. 908, 74 L.Ed.2d 738 (quoting Blue Shield, 457 U.S. 465, 102 S.Ct. 2540, 73 L.Ed.2d 149.) Factors favoring the defendants and which the Supreme Court concluded were controlling in Associated Gen. Contractors included: (1) "the nature of the plaintiff's alleged injury," (citing Brunswick v. Pueblo

Bowl-O-Mat) 459 U.S. 538, 103 S.Ct. 908, 74 L.Ed.2d 738 and (2) "the directness or indirectness of their asserted injury." 459 U.S. 540, 103 S.Ct. 910, 73 L.Ed.2d 739. As to the issue of "directness" the Supreme Court first identified the chain of causation then highlighted the importance of finding an

> "identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement . . . [and therefore] diminish the justification for allowing a more remote party to perform the office of private attorney general." (459 U.S. p. 542, 103 S.Ct. p. 911, 74 L.Ed.2d p. 741).

As part of its discussion of the "directness or indirectness" of the plaintiff's harm, the Supreme Court also raised its concerns about highly speculative damage claims, saying:

> "The indirectness of the alleged injury also implicates the strong interest, identified in our prior cases, in keeping the scope of complex antitrust trials within practically manageable limits. These cases have stressed the importance of avoiding either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other." 459 U.S. 543-544, 103 S.Ct. 911-912, 74 L.Ed.2d 741-42.

Turning now to the case at hand, the court first points out that a plaintiff's "standing to sue" is a preliminary matter to be evaluated in this circuit upon the pleadings alone. Const. Aggregate Transport at 763; Yoder Bros. at 1359 (standing to sue is a preliminary matter to be evaluated upon the allegations of the complaint). NaBanco's allegations that it has been unable to compete against

VISA member banks for merchant contracts due to the competitive advantage these banks enjoy from "on-us" transactions seem sufficient on their face to suggest a harm causally related to VISA's setting of an IRF. VISA's argument that NaBanco's own conduct severs the chain of causation because it has had realistic alternatives available to it to avoid paying IRF misses the mark. The antitrust laws do not require a potential plaintiff to take extraordinary measures to avoid anticompetitive activity; in fact, this is one of the things the antitrust laws are designed to prevent. Simpson v. Union Oil Co., 377 U.S. 13, 17, 84 S.Ct. 1051, 1054, 12 L.Ed.2d 98 (1964); Columbia Broadcasting System Inc. v. ASCAP, 562 F.2d 130, 136 (2d Cir. 1977), rev'd on other grounds, 441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979).

Further, the court finds that, under any characterization of antitrust standing currently urged upon us, NaBanco is a technically proper party to bring suit for treble damages. Using the methodology developed by the Supreme Court in Associated Gen Contractors, the court does not find that plaintiff has alleged or proved any specific intent on the part of VISA to harm NaBanco or those who stand in NaBanco's shoes but neither is such intent a necessary prerequisite to Section 4 standing. Plaintiff's alleged injuries are of the type Congress sought to remedy in providing a private remedy for violations of the antitrust laws. This is not a case, like Brunswick, in which plaintiff argues that the anticompetitive behavior by defendant (here, the setting of IRF) led to loss of profits due to increased competition in the market. Rather, NaBanco complains that it has been

unable to compete effectively with some VISA merchant banks due to price-fixing by VISA. NaBanco not only argues the potential for current competitive losses, but argues that innovative technological changes are being discouraged by VISA's anticompetitive activities. To the extent that such changes also present the possibility for increased competition in the future, NaBanco seems to have more than sufficiently met the requirement of Section 4 standing to bring its challenge to VISA's Interchange Fee Arrangement.

Finally, the court does not find that NaBanco's alleged harm is either too remote or indirect to prohibit it from bringing its treble damage action. In this case, the "chain of causation" between plaintiff's claimed injury and the alleged restraint promoted by VISA seems "direct" enough to sustain plaintiff's standing. To argue, as VISA does, that

the more appropriate plaintiffs are the merchant banks because they alone are in privity with VISA is to ignore the economic reality. While it is true that VISA merchant banks remain ultimately responsible for IRF, they are not primarily liable for its payment in all cases. Primary liability also lies with NaBanco as the merchant banks's functional equivalent in those cases in which VISA merchant bans (in contract with NaBanco) choose not to process transactional paper generated by VISA card purchases. In this way NaBanco aids the smooth functioning of the VISA system, a role which VISA should be reluctant to attenuate inasmuch as some of its participating merchant banks evidently do not find it cost-effective to perform the processing function themselves. Further NaBanco points to significant technological changes which it has made to accommodate changes in VISA's

processing methodology. Bull TR. 593 (5/12/82) P.Ex. 1172; D.Ex. 1180. Insofar as these are changes which have not had to be made by VISA merchant banks which use NaBanco or NaBanco-like institutions to process transactional paper, VISA member banks are hardly in a position to say that they are more directly affected by the setting of IRF than NaBanco.

Similarly, VISA's argument that Illinois Brick outlaws treble damages for "functional equivalents" is misplaced. Associated Gen. Contractors demonstrates that, to the extent that Illinois Brick is relevant to antitrust standing, it is so in how the policies identified and promoted by that decision relate to the standing issues presented in this case. The Illinois Brick Court was primarily concerned with problems of dual recovery and the possibility of having to calculate the variable incidence of harm experienced

by different antitrust victims where offensive use of pass-on damages was alleged. Arguably, these are problems which also arise in the context of this case. For instance, it is possible, as VISA points out, that some of the merchant banks with which NaBanco contracts actually absorb some of the costs and economic consequences associated with IRF in their individual contracts with NaBanco. This would, of course, cause problems for the court in calculating the extent of damage borne by NaBanco versus that borne by the merchant banks with which NaBanco contracts. But identifying the merchant banks as the more appropriate plaintiffs to bring this action does not eliminate our problems regarding the calculation of damages. In fact, it compounds them. At least when NaBanco pays IRF we can assume, even if not with complete accuracy, that it bears the full

economic cost of that payment without having to examine its individual contracts with merchant banks. It becomes harder for us to make that assumption in the case of merchant banks which use NaBanco since these banks do not pay IRF directly but only by virtue of whatever amount their contracts with NaBanco suggest they pay. We have similar problems with VISA's alternative argument that merchants, not merchant banks, are more appropriate plaintiffs than NaBanco to bring this suit. IF what VISA is really arguing is the defense of pass-on damages, the court notes that this defense is only applicable where there is an existing "cost-plus" contract or its functional equivalent; i.e., a contract in which the impact of the illegal overcharge is determined in advance of the actual overcharge without reference to the interactions of supply and demand and other market forces.

Hanover Shoe, 392 U.S. at 494, 88 S.Ct. at 2232 (supra); In Re Plywood Antitrust Litigation, 655 F.2d 627 (5th Cir. 1981).

An argument that NaBanco's contracts were really cost plus or a legal equivalent is, at least, superficially persuasive. However, NaBanco's response to what is perceived to be the IRF problem was varied and thus, presents a set of facts in which the "cost plus" assertion appears wanting.

Further, VISA's standing agreement suffers from a consideration of the second of the dual concerns of the Illinois Brick Court, the impairment of anti-trust enforcement by a reduced incentive to sue. In Illinois Brick and Hanover Shoe the Supreme Court voiced this particular argument in terms of the diffusion of benefits to each plaintiff when potential recoveries had to be divided among a large group of plaintiffs down the line of

economic causation, saying: "Added to the uncertainty of how much of an overcharge could be established at trial would be the uncertainty of how that overcharge would be apportioned among the various plaintiffs." Illinois Brick 431 U.S. at 745, 97 S.Ct. at 2074. By allowing enforcement only by those who actually pay IRF, we limit the pool of potential plaintiffs. Thus, the concern for reducing the effects of treble damage suits brought by indirect purchasers with a smaller stake in the outcome is alleviated. Illinois Brick at 724, 97 S.Ct. at 2064.

Even more importantly, however, we assure ourselves of a potential plaintiff at the very least. NaBanco does fall prey to some of the same conflicts of interest which beset many VISA member banks which both issue cards and serve merchants, raising questions about its ability to

pursue vigorously any cause of action against VISA; however, in arguing that only merchant banks have standing to sue it, VISA essentially invites its members to sue themselves for antitrust violations from which they in fact may benefit. While the possibility of suit by VISA member banks does exist, it is almost more reasonable to conclude that member banks will attempt to ameliorate any problems they have with the IRF via their more direct access to the VISA Board of Directors. This opportunity is less available to NaBanco as a VISA non-member.

Injunctive Relief

Aside from seeking treble damages, NaBanco asks the court to enjoin VISA from continuing to conspire to fix prices. This request is based on § 16 of the Clayton Act, 15 U.S.C. § 26, which states in relevant part:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, . . .when and under the same conditions and the principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity. . . .

Given the fact the court has already recognized NaBanco's standing under § 4 of the Clayton Act, an elaborate discussion of NaBanco's standing under § 16 is unnecessary. Most "courts take a less constrained view of standing in suits involving injunctive relief than in those demanding treble damages. . . ." Jeffrey v. Southwestern Bell, supra, at 1132. Even indirect purchasers can maintain

actions for injunctive relief. In re Beef Indus. Antitrust Litigation, 600 F.2d 1148, 1167 (5th Cir. 1979), cert. denied, 449 U.S. 905, 101 S.Ct. 280, 66 L.Ed.2d 137 (1980). This is because "the policy considerations underlying the pass-on rule are not implicated in claims for injunctive relief." Id. Neither the risk of exposure to multiple liability or the difficulty in tracing the allocation of the overcharging among different levels of purchasers is related to the issue whether a party should be entitled to sue for injunctive relief. Nor does the position taken in Illinois Brick that effective enforcement of the antitrust laws requires that only direct purchasers be permitted to sue for treble damages have validity in the context of § 16.

To achieve standing under § 16 then, all NaBanco must prove is that it is threatened with loss or injury cognizable

in equity proximately resulting from the antitrust violation. Mid-West Paper Products at 591. Some courts have interpreted this proximate cause standard as one "no more rigorous than the general rule of standing." Tugboat, Inc. v. Mobil Towing Co., 534 F.2d 1172, 1174 (5th Cir. 1976). Even if this were not the case, and the line drawing for proximate causation was necessarily to be drawn somewhere between the general rule of standing and standing for treble damage actions, that need not concern us here. This is not a case involving facts making it necessary to "measure the outer range of standing to sue under § 16. Mid-West Paper Products at 593. NaBanco is not like "potential plaintiffs . . . who may only be remotely affected by the ripples caused by the conspirators' tampering with the supply and demand curve." Id. NaBanco contends ". . . that under all

circumstances prevalent in the real economic world, money is passing from [its] hands into the pockets of [VISA member banks] as a result of [IRF]. . . ." Mid-West Paper Products at 593. In order to participate in the system, NaBanco must pay IRF or it cannot access issuer banks to complete payment transactions. These facts seem sufficient in light of the policies behind § 16 to give NaBanco standing.

PER SE VERSUS RULE OF REASON

Section 1 of the Sherman Act reads in pertinent part as follows:

> § 1 Trusts, etc. in restraint of trade illegal; penalty
> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations,is declared to be illegal. 15 U.S.C. § 1

In enacting Section 1, Congress condemned in broad language concerted conduct which restrains trade. With such guidance as might be found in the common law cases, it left to the courts the scope and meaning of this mandate. As has been the case with Section 16 of the Clayton Act, the very breadth of the condemnation unavoidably gives rise to ambiguity, leading courts long ago to conclude that Congress could not have literally meant to ban every contract which in any sense restrains trade. As Justice Brandeis pointed out in Board of Trade of the City of Chicago v. United States, 246 U.S. 231, 38 S.Ct. 242, 62 L.Ed. 683 (1918):

> [T]he legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation in trade, restrains. To bind, to restrain, is of

> their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. Id. at 238, 38 S.Ct. at 244.

In the years since the adoption of the Sherman Act in 1890, a number of competing views have been put forward as to its meaning. Stated simply, however, the governing law has been that the Sherman Act bans all concerted arrangements which are adopted for the purpose of reducing competition, or which, regardless of purpose, have a significant tendency to reduce competition. However, arrangements which are adopted for and tend to achieve other legitimate purposes do not fall within the condemnation of the

Act merely because of some incidental and inconsequential restraining effect on competition.

This general position has been reached, not directly, but through two subsidiary rules, the per se doctrine and the rule of reason, which taken together tend to condemn arrangements which have the purpose or effect of significantly restraining competition and to validate those which do not. The per se rule forecloses any analysis of the purpose of a restraint or the nature, extent and degree of its market effect, thus avoiding "the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable." Northern Pacific Ry. v. United States, 356 U.S. 1, 5, 78 S.Ct.

514, 518, 2 L.Ed.2d 545 (1958). Thus the per se rule is generally limited to those categories of restraints for which no elaborate study of an industry is needed to establish that their nature and effect is "plainly" or "manifestly" anticompetitive. Broadcast Music, Inc. v. Columbia Broadcasting Sys. Inc., 441 U.S. 1, 8, 99 S.Ct. 1551, 1556, 60 L.Ed.2d 1 (1979); Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 646, 100 S.Ct. 1925, 1927, 64 L.Ed.2d 580 (1980); National Society of Professional Engineers v. United States, 435 U.S. 679, 692, 98 S.Ct. 1355, 1365, 55 L.Ed.2d 637 (1978); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 50, 97 S.Ct. 2549, 2557, 53 L.Ed.2d 568 (1977). To be manifestly anticompetitive, agreements or practices must have a "pernicious effect on competition and lack . . . any redeeming virtue." Northern Pac. Ry. v.

United States, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (quoted in Sylvania, 433 U.S. at 58, 97 S.Ct. at 2561).

The classic definition of the rule of reason was enunciated in Standard Oil, supra, if asserted in its embryonic form in United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 17 S.Ct. 540, 41 L.Ed. 1007 (1897). As construed in Standard Oil, Section 1 of the Sherman Act was an "all-embracing enumeration to make sure that no form of contract or combination" by which undue restraint was achieved "could escape condemnation." 221 U.S. 1, 58-60, 31 S.Ct. 502, 515-516, 55 L.Ed. 619. The function of "reason" in the analysis is to discriminate between restraints which are "undue" and those which are not. In Professional Engineers the Supreme Court indicated that,contrary to its name and the suggestion of Mr.

Justice White in United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 17 S.Ct. 540, 41 L.Ed. 1007 (1897), the rule of reason "does not open the field of inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason." Professional Engineers, 435 U.S. at 688, 98 S.Ct. at 1363. Instead, the basic inquiry is limited to whether the restraint in question "is one that promotes competition or one that suppresses competition." Id. at 691, 98 S.Ct. at 1365. The opinion stressed that such an inquiry "is confined to a consideration of impact on competitive conditions" and that the function of the court is "to form a judgment about the competitive significance of the restraint." Id. at 690, 692, 98 S.Ct. at 1364-1365. Because the inquiry is limited to determining the "market impact" on competition, defenses

"based on the assumption that competition itself is unreasonable" or upon considerations unrelated to the effect of the restraint on competition are irrelevant. Id. at 696, 98 S.Ct. at 1368.

NaBanco's Per Se Argument

At least twice before[14/] this court has considered and rejected NaBanco's argument that the action of the VISA Board of Director's in establishing and setting a fixed fee for interchange transactions is a "per se" violation of 15 U.S.C. § 1. Despite this court's previous rulings on the matter, NaBanco has pressed the argument that the relevant market in this case is the market consisting of the five major general purpose credit cards.

14/ NaBanco has raised the issue of per se validity several times: (1) two motions for preliminary injunction; (2) two motions for partial summary judgment; (3) trial brief; and (4) at trial. By order dated September 15, 1980, this Court denied NaBanco's various summary judgment motions.

NaBanco argues further that the proper analytical framework within which to analyze whether VISA's activities have any competitive impact is one which consists of three separate and distinct "markets": one for card-issuing services; the second for merchant-servicing banks; the third for "IRF-like" interchange services. The card-issuing market consists of banks and other institutions which offer consumers various credit card services having a multiplicity of characteristics. Included among these characteristics are credit options and other money management capabilities, varying degrees of card recognition and/or acceptance rates, different convenience qualities, etc. The traits associated with the market for merchant banks are two-fold, including what NaBanco calls a "factoring service" and an "account carrying" or "clearinghouse" service. By "factoring

service", NaBanco means the initial contract by which a merchant bank or a "NaBanco-like" institution agrees to "purchase" merchant receivable items created by consumer bank credit card use; NaBanco uses the second two terms to identify the mechanics of processing claims and paying accounts.

Each of these separate and distinct markets are national in scope according to NaBanco [Bull TR. 640-41 5/12/82], the competitors in the card-issuing market allegedly including not only VISA and Mastercard but also the traditional T & E cards (American Express, Carte Blanche, Diner's Club), certain debit cards, and bank ATM cards. NaBanco's description of the competitive actors in the merchant-servicing market includes those banks which act as merchant-servicing banks, as well as other entities such as NaBanco which provide the same kinds of general

services to merchants, with varying degrees of emphasis, facilities, and expertise.

As mentioned earlier, NaBanco has taken the position that merchant banks are selling receivables to issuer banks, and the issuer banks, through the control of the VISA Board of Directors, are directly fixing the discounted price of those sales by means of the Base II exchange fee imposed on those members which elect to use Base II.

The Facial Unreasonableness Test

Alternatively, NaBanco argues that should the court determine the IRF is not per se illegal the test the court should apply in determining IRF's legality under the antitrust laws is the "facial unreasonableness test." This test, first enunciated in United States v. Realty Multi-List, Inc., 629 F.2d 1351 (5th Cir. 1980) is actually a two-part test which,

unlike either the per se or rule of reason tests, shifts the burden of proof from the plaintiff to the defendant; i.e., once the plaintiff has sustained its burden of proving that a defendant's activities are a "significant restriction" affecting competition and that the defendant has significant market power, the burden then shifts to the defendant to show that the particular practice in question is "justified by the competitive needs" of the defendant and also both "reasonably necessary to the accomplishment of the [defendant's] legitimate goals" as well as narrowly tailored to that end. Id. at 1370.

VISA's Answer to NaBanco's Per Se Argument

NaBanco buttresses its per se argument by pointing to a long line of cases, beginning with United States v. Trenton Potteries Co., 273 U.S. 392, 47 S.Ct. 377, 71 L.Ed. 700 (1927), in which

price fixing, as a concerted activity among competitors, is treated as "naked" price constraint. (See also Trans-Missouri Freight Ass'n, supra, 17 S.Ct. 568.) This is true whether the price "fixed" is the ultimate price of a good or service or simply a component of the ultimate price. Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 645, 100 S.Ct. 1925, 1926, 64 L.Ed.2d 580 (1980). Further, a price-fixing agreement that establishes maximum prices is considered to be a illegal as one establishing minimum prices. Arizona v. Maricopa County Medical Society, 457 U.S. 332, 102 S.Ct. 2466, 73 L.Ed.2d 48 (1982); see also Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed. 219 (1951).

This jurisprudence of per se price fixing validity exists because, for the most part, it has been difficult for

courts to conceive of any example in which consequent enhancement of competition arises in the context of price fixing or, even if such enhancement occurred, that it could be so great as to render the restraint insignificant in accordance with the dictates of the rule of reason. Lawrence Sullivan Antitrust, W. Publishing Co., St. Paul, Minn. (1977) p. 196. Almost all the cases upon which NaBanco relies, however, display three unifying characteristics: (1) the practices examined were related to the market in such a way that if they were to have any effect at all it would be on price formation, (2) the practices lacked any significant degree of integration of functions among the competitors, and (3) the arrangements were not ones which helped to make or improve a market by facilitating trading, exchanging information, standardizing product or the

like. Since price formation was affected, if there was any consequence at all it is entirely fair and functionally accurate for courts to treat arrangements like these as naked restraints.

VISA, however, has successfully opposed NaBanco's arguments in prior proceedings in this case on the grounds that NaBanco's per se price fixing theory is simply inapposite to the economically complex practices at issue in this case. While acknowledging high levels of vigorous competition at both the card-issuing and merchant-servicing ends of its bank credit card system, VISA challenges NaBanco's "tri-market theory." First it contends that "issuer" banks and "merchant" banks are not two separately competing sets of VISA members. The terms are useful only as indicators of a member's role in any single interchange transaction. Nor is it accurate, says

VISA, to speak of issuing and merchant banks as members with adverse interests. VISA further contends that it is meaningless to speak of a "product" offered at either the card-issuing or merchant-servicing end separated from its counterpart at the other. Bank credit cards, VISA argues, are useful only to the extent they provide the cardholder with purchasing options. All the characteristics which NaBanco asserts are so important to credit card differentiation, therefore, are only important to the extent they enhance any particular credit cardholder's purchasing options by increasing the numbers and kinds of participating merchants. Concomitantly, the numbers and kinds of participating merchants depends to a great extent on the numbers and kinds of consumer cardholders, as well as characteristics of individual merchant-

servicing banks. In fact, (VISA asserts) the particular demand for merchant banks suggested by NaBanco would not exist but for the demand by consumers for purchasing options. Viewed from the perspective of the participants, for the VISA service to exist at all there must be members willing to issue cards and members willing to sign merchants.

Thus, argues VISA further, the relevant market in this case is the market consisting of all nationwide payment services used in retail sales, including VISA, Mastercard, T & E cards, merchants' proprietary cards, merchants' open book credit, cash, travelers cheques, ATM cards, personal checks and check guarantee cards, rather than the market for the Interchange Fee which VISA contends is either non-existent or at most an example of market failure at its most extreme since only one buyer (the cardholders'

issuer bank) reasonably exists for each piece of transactional paper. In making its argument then, VISA likens itself to a joint venture. The setting of IRF, far from being a naked restraint of trade as NaBanco asserts, rather becomes a device for sharing costs within the VISA system. This device, which, VISA argues is necessary in order to produce the VISA product, thereby enhances "interbrand" competition which VISA argues "is the primary concern of the antitrust law." Sylvania, 433 U.S. 36, 52 n. 19, 97 S.Ct. 2549, 2558, n. 19, 53 L.Ed.2d 568. Even if IRF were not necessary to market the VISA product, VISA argues it should be analyzed under the rule of reason because it is an agreement internal to a joint venture which yields efficiencies beneficial to competition, that its members, acting alone, could not offer, and which allows the venture to offer a

product which is different from, and greater than, the sum of the individual products of its members. Broadcast Music Inc. v. C.B.S., 441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979); United States v. Multi-Realty (supra).

Rejection of the Per Se Rule

Previous discussions have consistently recognized the pro-competitive or efficiency creating potential of joint ventures and other cooperative organizations. While joint ventures are not immune from antitrust scrutiny, the antitrust laws allow restraints necessary to accomplish pro-competitive objectives of joint ventures and similar organizations. See, e.g., United States v. Realty-Multi List, Inc., 629 F.2d 1351, 1368 (5th Cir. 1980); Central Iowa Power & Federal Energy Regulatory Commission, 606 F.2d 1156, 1163 (D.C. Cir. 1979). When these restraints,

sometimes called "ancillary restraints" are addressed, per se prohibitions are not applied because it cannot be said that in the aggregate, the gains from imposition of the per se rule will far outweigh the losses. Board of Regents of the University of Oklahoma v. National Collegiate Athletic Ass'n, 7078 F.2d 1147, 1153 n. 6 (10th Cir. 1983), cert. granted, U.S.___, 104 S.Ct. 272, 78 L.Ed.2d 253 (1983). As the Supreme Court recognized in Broadcast Music Inc. v. C.B.S., 441 U.S. 1, 23, 99 S.Ct. 1551, 1564, 60 L.Ed.2d 1 (1979), joint ventures "are not usually unlawful, at least not as price fixing schemes, where the agreement on price is necessary to market the product at all." Accord, Arizona v. Maricopa County Medical Society, 457 U.S. 332, 102 S.Ct. 2466, 73 L.Ed.2d 48 (1982). Accordingly, such agreements are analyzed under the rule of reason so that courts

can weigh their pro-competitive effects. See, e.g., North American Soccer League v. Nat'l Football League, 670 F.2d 1249, 1259 (2d Cir. 1982); Los Angeles Memorial Coliseum Commission v. National Football League, 468 F.Supp. 154 (C.D. Cal. 1979), reversed on other grounds 634 F.2d 1197 (9th Cir. 1980); Worthen Bank & Trust Co. v. National Bankamericard, Inc., 485 F.2d 119 (8th Cir. 1973) cert. denied, 415 U.S. 918, 94 S.Ct. 1417, 39 L.Ed.2d 473 (1974); Smith v. Pro Football, Inc., 593 F.2d 1173 (D.C. Cir. 1978); National Bank of Canada v. Interbank Card Ass'n, 507 F.Supp. 1113, 1122 (S.D.N.Y. 1980) aff'd, 666 F.2d 6 (2d Cir. 1981); Broadcast Music, Inc. v. Moor-Law, Inc., 527 F.Supp. 758, 765 (D. Del. 1981) aff'd 691 F.2d 490 (3d Cir. 1982); Palmer v. Roosevelt Lake Log Owners Ass'n, 551 F.Supp. 486 (E.D. Wash. 1982).

Given this background of jurisprudence, the court concludes that IRF should be analyzed under the rule of reason because it is an agreement on the terms of interchange necessary for VISA to market its product and be an effective competitor. Broadcast Music Inc. v. C.B.S., 441 U.S. 1, 23, 99 S.Ct. 1551, 1564, 60 L.Ed.2d 1 (1979). The Broadcast Music case teaches that in separating those price-fixing arrangements to which the per se rule is to be applied from those to be examined under a rule of reason analysis, the Court is to assess whether "facially" the practice "always or almost always" tends to restrict output, or whether "facially" it is likely to contribute to the creation of "economic efficiency." Other than the testimony of one of NaBanco's experts, Louis A. Guth, plaintiff has failed to produce any evidence suggesting the existence of

separate and independent card-issuing and merchant-servicing markets. All the evidence presented at trial has pointed to a complex set of inter-relationships between cardholder and merchant demands for the VISA service suggestive of a joint venture - even if VISA cannot be properly characterized as one in the strictest sense of the word.

In VISA's case, profits and losses are not specifically shared among the various VISA members, nor is there any commingling of management functions. Furthermore, to the extent possible, each member engages as an independent unit in economic competition with other VISA members with respect to various aspects of their common venture. For example, merchant banks compete with issuer banks to sign up cardholders and, to the extent

that certain banks perform both functions, VISA members compete with each and every one of their fellow affiliates.

Nevertheless, while considerations such as these may be important to courts considering joint venture labels, there is no requirement, for example, that a joint venture-like entity integrate or share costs in some prescribed fashion in order to survive per se scrutiny. See Louis, "Restraint Ancillary to Joint Ventures and Licensing Agreements: Do Early and Topco Logically Survive Sylvania and Broadcast Music?" 66 Va. L. Rev. 879, 896 n. 114 (1980); Los Angeles Memorial Coliseum Commission v. National Football League, 468 F.Supp. 154, 163 (C.D. Cal. 1979) (applies rule of reason even though "profits and losses are not shared.)"

The fact that VISA members have integrated to the extent of agreeing on the terms of interchange, but have not

fully integrated and still compete for cardholders and merchants, is typical of pro-competitive joint ventures and serves to maximize VISA's competitive potential. The fact of the matter is that even NaBanco does not go so far as to challenge the whole plethora of ancillary regulations attendant to the VISA structure, including, for example, the obligation of all issuer banks to reimburse the merchant banks (and thus the "NaBancos" in the system) for processing the transactional paper generated by their cardholders' use of their VISA cards.15/ It is, perhaps, appropriate to note parenthetically that so long as there are benefits to be parlayed into profits, NaBanco has elected to remain in VISA's beneficial ambit. Even if the Court were

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15/ As a further example, merchants in the VISA system are required to honor proper customer requests to use the card, and, of course, to abide by other system regulations.

to conclude that VISA is not akin to a "joint venture;" we could not ignore NaBanco's reluctance to "throw the baby out with the bath water."

In any event, IRF serves to share substantial costs and risks between VISA members, and interchange transactions are an integration because in such transactions two different members combine their activities in order to offer a service to a cardholder and a merchant.

Thus, VISA is a joint venture in that terms most meaningful sense, i.e., whether or not the composite entities compete with one another in any meaningful sense in the marketplace under examination. Unwarranted emphasis upon formalistic aspects of the relationship of VISA and its member institutions ignores the subtle but more significant interdependency of the members and their indivisibility with VISA. Assuming that VISA cardholders want

unplanned and rapid access to merchants anywhere, regardless of whether their own bank signed a particular merchant, and that VISA merchants want unplanned and rapid access to each cardholder who enters their shop, regardless of whether the merchant's bank signed the cardholder, then some before-the-fact agreements must be made. The principal purpose of these agreements with member banks does not appear to be to improperly fix prices as NaBanco asserts but rather to provide a service which each member bank could not alone provide, namely, universal payments service which ensures that a VISA card will be honored by any merchant regardless of which bank issued it so long as that merchant displays the VISA logo on its door. Given past and current interstate banking regulations which once flatly proscribed and continues to inhibit the growth of single bank entities which cross

state lines, it is hard to conclude otherwise. Even assuming that each VISA member could afford to issue its own card, there would be no assurances of universality since issuer banks and merchant banks might still differ as to exchange rates. Cardholders would either have to carry a suitcase full of cards representing the different banks which have contracts with particular merchants or suffer the disappointment of being unable to transact certain purchases with merchants whose merchant banks refused for some reason to contract with the cardholders' bank; to say nothing of the inconvenience and dissatisfaction of the merchant who must check each card out with its merchant bank even if it may mean that he will lose a sale. Prohibiting IRF would thus undermine "interbrand" competition, "which is the primary concern of the antitrust law." Continental T.V.

Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 52 n. 19, 97 S.Ct. 2549, 2558 n. 19, 53 L.Ed.2d 568 (1977).

Even if IRF were not necessary to market a payment services product of the type in question, it should be analyzed under the rule of reason because it is an agreement internal to a joint venture which yields efficiencies beneficial to competition. VISA's members, acting alone, could not offer such efficiencies which indeed allow the venture to offer a product which is different from, and greater than, the sum of the individual products of its members. Broadcast Music, supra; Realty Multi List, Inc., supra.

Broadcast Music and Maricopa do not require the court, as NaBanco contends, to make a subjective judgment as to whether a joint ventures product is "unique." Rather, they call for the court to compare the product of the venture to the

individual offerings of the venture's members and determine whether the venture offers procompetitive abilities which its members acting alone could not offer. Broadcast Music, 441 U.S. at 21-23, 99 S.Ct. at 1563-1564; United States v. Columbia Pictures Industries, 507 F.Supp. 412, 430 (S.D.N.Y. 1980). Thus the agreement to market compositions in Broadcast Music survived the per se test even though the individual composers could market their compositions on their own. 441 U.S. at 23-24, 99 S.Ct. at 1564-1565. The consolidation of thousands of what would otherwise be balkanized local cards into one internationally accepted card makes the VISA system a viable and competitive whole which is "truly greater than the sum of its parts." Broadcast Music, 441 U.S. at 21-22, 99 S.Ct. at 1563. A similar agreement (governing a cost sharing arrangement reimbursing one

airline which provides credit card services to a passenger who flies on a different airline) accordingly was analyzed under the rule of reason and ultimately upheld by the Civil Aeronautics Board in In Re UATP - 1976 Agreements, 85-11 C.A.B. 2481 (1980).

Further, IRF is properly analyzed under the rule of reason because it is not mandatory. Acting on behalf of its principals, NaBanco is and always has been free to negotiate different terms of interchange, (not using Base II) and some VISA issuers have been willing to make alternate arrangements. A practice is not unlawful per se where as in this case, there is no legal, practical or conspiratorial impediment to making alternate arrangements. Broadcast Music, Inc. v. C.B.S., 441 U.S. 1, 24,

99 S.Ct. 1551, 1564, 60 L.Ed.2d 1 (1977); In Re ATP-1976 Agreements, 85-11 C.A.B. 2481 (1980).

The Supreme Court's decision in Arizona v. Maricopa County Medical Society, 457 U.S. 332, 102 S.Ct. 2466, 73 L.Ed.2d 48 (1982) confirms this analysis. The agreement in Maricopa was held to be illegal per se because, unlike IRF, it fixed the prices charged to third parties by individual doctors for their own services. 102 S.Ct. at 2480. Moreover, and also in contrast with the IRF arrangement, the Maricopa court granted summary judgment only after reporting - six separate times - that nothing in the record even arguably supported the defendants' assertion that agreement on a fee was necessary to market the product. 102 S.Ct. at 2477, 2477-78 n. 26, 2478, 2479 n. 33. At the same time, the court in Maricopa confirmed their approach set

forth in BMI and emphasized that agreements on price which are inherent in the structure and successful operation of a bona fide joint venture can be "perfectly proper." 102 S.Ct. at 2480.

In Worthen Bank & Trust Co. v. National BankAmericard, Inc., 485 F.2d 119 (8th Cir. 1973), cert. denied, 415 U.S. 918, 94 S.Ct. 1417, 39 L.Ed.2d 473 (1974), the Court refused to apply the per se rule because of lack of experience with the economics of a fledgling industry. In discussing a different by-law of VISA's predecessor NBI, the Court said:

> The bank card industry is a relatively new one and, with over eight billion dollars in annual business, a very large and important segment of our economy. Considering the importance of the industry and the lack of definitive information relating to competition therein, it would be

> a mistake to determine this case of first impression on a per se basis. This is especially true where it may result in the dilution of competition or the elimination of one of the two competitors where this is not an aggregate of illegal restraints such as price fixing or exclusive territorial allocations and where the initial purpose in forming the joint venture, to produce a national credit card, is obviously not illegal. 485 F.2d 119, 129-130.

Courts have been reluctant to apply the per se rule in cases involving whole markets which do not readily fit into the antitrust context. Prime examples of this type of situation are those cases involving challenges to the rules of sports associations. There is no compelling reason why many of the characteristics the courts have found to

be fundamental to those organizations should not be found to be equally important to the functioning of the VISA system. Like the sports association, the VISA system is an example of an association where cooperation is as much a necessary part of the "game" as competition. Just as there is a need to establish some "rules of the game," affecting such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed,16/ in order for there to be sports contests at all, so too there must be "rules" to enable the efficient coordination of the otherwise disparate operations of VISA members. Furthermore, just as the establishment of game rules by professional organizations does not mean

16/ NCAA v. Board of Regents of Univ. of Okla., ____ U.S. ____, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984).

that individual member clubs do not compete for players and fans or between each other on the playing field, the creation of VISA by-laws has not precluded competition among individual VISA members. In this way, cooperation and competition have made for the best of all possible worlds, a world which would probably not exist but for this particular combination. In NCAA v. Board of Regents (supra), the Supreme Court, while finding the television plan in question violative of the Sherman Act (because of its clear restraints), refused to apply the per se rule in a setting which (absent similar restraints) lends itself to comparison with the functional needs of the VISA system.

In choosing to apply the rule of reason analysis to this case, the court also rejects the applicability of the so-called "facial unreasonableness" theory

set forth in Broadcast Music and applied in Realty Multi List. First, it should be noted that Realty Multi List is a group boycott case, and not a case of alleged horizontal price fixing as is this case. In any event, if we assume that Realty Multi List applies to the facts of this case, it presents only a poor variation of the rule of reason test appropriate here in light of the "joint venture" nature of the VISA system. The Realty Multi List court suggests as much when it says: "This argument is, of course, a version of the rule of reason." Id. at 1369.

The facial unreasonableness theory can properly be invoked only where the practice at issue constitutes a "significantly restrictive rule of a combination or trade association with significant market power, which lacks competitive justification or whose reach clearly exceeds the combination's

legitimate needs." Id. at 1370. Membership rules, such as those at issue in Realty Multi List, present viable candidates for invalidation as "significantly restrictive" under this test since they presumptively preclude competitors from participating in an essential market. But cost sharing arrangements among partners or venturers are not patently "restrictive" for the reasons addressed by this court in rejecting per se treatment.

Moreover, even if IRF appeared to be sufficiently "restrictive" to invoke the facial unreasonableness theory, a rule of reason analysis could be avoided only if plaintiff demonstrated that VISA possessed "significant market power" since it is, of course, unlikely that serious anticompetitive effect will result from exclusion from membership [or restrictive practices]" if such power is lacking. Id.

at 1372 at n. 40. In this respect, the contrast between the VISA situation and the multiple listing service in Realty Multi-List, Inc., is striking. Multiple listing services involving local markets and exclusionary membership rules almost invariably possess the requisite degree of market preclusion. Indeed, in Realty Multi List, the issue was hardly disputed, and there the issue was reserved for trial. Id. at 1372 n. 39. Here consideration of the relevant market reveals that VISA has no significant market power, notwithstanding plaintiff's suggestion that the court need not undertake a proper inquiry into demand cross-elasticities.

Furthermore, if we assume NaBanco could cross the "market power" threshold, the facts adduced at trial demonstrate sufficient pro-competitive justification to require that a full rule of reason

inquiry be undertaken. The need for a cost-sharing mechanism within the VISA joint venture is itself sufficient justification as Broadcast Music indicates. This Court has already recognized, for example, that the question whether IRF could be replaced by "competition" at least presents an issue of fact, if we indulge the assumption that a negative answer to that question is not obvious.

In sum, care must be taken to avoid "easy labels," whether appearing in Latin (per se rules) or convenient shorthands ("facial unreasonableness"). The critical inquiry under the Sherman Act must be whether a challenged practice is anti-competitive in its economic effects. The explanation this court includes below of why IRF is highly competitive and thus lawful under the rule of reason confirms the conclusion that condemning the fee out

of hand, as either per se unlawful or "facially unreasonable," would be a mistake.

RULE OF REASON ANALYSIS

Having, hopefully, illuminated the passage to a consideration of the reasonableness of VISA's fee plan, the court now turns to an analysis of the competitive effects of IRF as an agreement ancillary to a type of "joint venture." Under the rule of reason test it is plaintiff's burden to establish that the practice complained of has an adverse impact on competition. Graphic Products Distributors, Inc. v. Itek Corp., 717 F.2d 1560, 1573 (11th Cir. 1983). It should be stressed, however, that in making this a determination, the relevant question is not whether the challenged practice is the most competitive device that can be imagined, or the "least restrictive," but simply whether it is reasonable; i.e., not

"unduly" restrictive of competition. GTE Sylvania, Inc., supra, 433 U.S. 49, 97 S.Ct. 2557; National Auto Broker Corp. v. General Motors Corp., 572 F.2d 953, 960 (2d Cir. 1978), cert. denied, 439 U.S. 1072, 99 S.Ct. 844, 59 L.Ed.2d 38 (1979). So long as a practice is "fairly necessary" to achieve a legitimate purpose, it is not unlawful under the rule of reason. Broadcast Music, Inc. v. Moor-Law Inc., 527 F.Supp. 758, 769 (D. Del. 1981), quoting American Motors Inns v. Holiday Inns, Inc., 521 F.2d 1230, 1248-49 (3d Cir. 1975). In applying this standard, the competitive benefits of the challenged practice are weighed against its alleged harmful effects and a violation of the Sherman Act will be found only where the balance tips decidedly in favor of the latter. Columbia Broadcasting System, Inc. v. American Soc. of Composers, Authors and Producers, 620

F.2d 930, 934 (2d Cir. 1980), cert. denied, 450 U.S. 970, 101 S.Ct. 1491, 67 L.Ed.2d 621 (1981); National Bank of Canada v. Interbank Card Ass'n, 507 F.Supp. 1113, 1122 (S.D.N.Y. 1980).

As suggested above, plaintiff must shoulder the burden, in "rule of reason" presentation to demonstrate the balance tipping in plaintiff's favor; that is, demonstrating that alleged anticompetitive effects of the setting of an IRF decidedly outweigh the pro-competitive benefits of the practice. See, e.g., Red Diamond Supply, Inc. v. Liquid Carbonic Corp., 637 F.2d 1001, 1005, 1007 (5th Cir.; cert. denied, 454 U.S. 827, 102 S.Ct. 119, 70 L.Ed.2d 102 (1981); Continental TV, Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49, 97 S.Ct. 2549, 2557, 53 L.Ed.2d 568; Columbia Broadcasting System, Inc. v. A.S.C.A.P., 620 F.2d 930, 934 (2nd Cir., 1980), cert. denied, 450 U.S. 970, 101 S.Ct. 1491, 67

L.Ed.2d 621 (1981). Moreover, in meeting its burden, NaBanco must prove far more than that the practice it challenges has had an effect on its business. See, e.g., Oreck Corp. v. Whirlpool Corp., 579 F.2d 126, 133-134 (2nd Cir. 1978); Balogh's of Coral Gables, Inc. v. Getz, 510 F.Supp. 741, 748 (S.D. Fla. 1981); JBL Enterprises, Inc. v. Jhirmack Enterprises, Inc., 509 F.Supp. 357, 366 (N.D. Cal. 1981). The existence or non-existence of market power in a relevant market is a critical consideration. Spectrofuge Corp. v. Beckman Instruments, Inc., 575 F.2d 256, 277 (5th Cir. 1978) cert. denied, 440 U.S. 939, 99 S.Ct. 1289, 59 L.Ed.2d 499 (1979).

A relevant market, or "area of competition," consists of two elements - products and geography. Brown Shoe Co. v. United States, 370 U.S. 294, 324, 82 S.Ct. 1502, 1523, 8 L.Ed.2d 510 (1962). As for

the former element, the Supreme Court has held that is is defined by reference to "the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and the substitutes for it." Id. at 325, 82 S.Ct. at 1523-1524. See also United States v. E.I. DuPont DeNemours & Co., 351 U.S. 377, 394-96, 76 S.Ct. 994, 1006-1008, 100 L.Ed. 1264 (1956).

There is a defect in NaBanco's argument which can only be successfully dealt with by accepting VISA's argument that the sale of receivables makes no sense except in its connection with a payment service system. It is, perhaps, appropriate to point out parenthetically that NaBanco would not exist but for the payment systems. The court finds that the relevant market in this case consists of the market for payment systems as VISA contends. Not only did the testimony at

trial suggest that VISA developed as the result of Bank of America's determination to provide and promote a payment system of nationwide proportions to compete with other payment systems then in existence, the evidence also indicated considerable success. The cross-elasticity of both demand for and supply of VISA and other payment devices is quite high. Both cardholders and merchants who testified at trial considered the VISA services equivalent or sufficiently close to a variety of payment systems used in retail sales, including other credit cards, travelers cheques, cash, ATM cards, personal checks, and check guarantee cards. Edwards. TR. 110-124 (6/2/83); Baxter. TR. 24-35 (2/13/83); Phillips. TR. 144-151 (6/6/83); Emerson. TR 20 (1/13/84). While each of these different payment service devices was not considered to be a close substitute for a VISA card

for purchases of every possible product at every possible price, all payment services taken together were sufficient to provide, at the least, several close substitutes for a VISA card in any possible context. Cash, for example, might be a good substitute for face-to-face transactions involving small dollar amounts, while checks would be better for larger transactions involving long-distance exchanges. Phillips. TR. 144-151 (6/6/83); Baxter. TR. 24-35 (2/13/83).

Testimony by VISA experts also confirmed substitutability between VISA and other, technologically innovative, payment devices including but not limited to regional ATM cards (Cox. TR. 128-29 (1/13/83)), debit cards (Duffy. TR. 2870-72 (9/23/82)), as well as retail proprietary cards (Duffy. TR. 2667 (9/22/83)) and new multi-purpose cards like

the Sears/Merrill Lynch cards now available. Cox. TR. 86-89, 128-29 (1/13/83).

To the extent that VISA also extends credit to consumers it can also be argued that it competes in the credit extension market along with commercial banks, savings and loan associations, consumer finance companies, credit unions, and certain competing credit cards such as MasterCard, department store proprietary cards, and oil company cards. NaBanco, however, has never alleged nor contended that VISA has any market power in this market, nor has it ever alleged that either VISA or its IRF requirement presented any anticompetitive effects therein. Therefore, the court does not include these credit extending devices within the relevant market except to the extent these devices also serve as payment

system mechanisms (e.g. MasterCard, proprietary cards, oil company cards, etc.).

As for the geographic market which is relevant in the context of this case, there appears to be no issue: VISA competes nationally, indeed internationally, with competitive payment systems. Since NaBanco's business is similarly conducted on a nationwide scale, no relevant geographic sub-market is even arguably presented. NaBanco agrees with this. See NTB at 25.

Having already defined the relevant market as the nationwide market for payment systems, the court must still consider whether or not VISA's share of that market is such as to indicate that it wields power in that market. The Court concludes that it is not. VISA's share of the payment services market is probably less than five percent according to

testimony heard at trial. Edwards 118-20 (6/3/83); Cox 139-40 (1/13/83). Exhibits 2089-2904. This share is far too small to allow VISA to have any legally pertinent anticompetitive effects. Cox TR. 139-40 (1/13/84); Phillips TR. 156-58 (6/6/83); Guth TR 3-4 (1/18/84).

Furthermore, in the opinion of NaBanco's own expert, Dr. Cox, the new regional ATM debit card networks will one day force VISA out of business unless VISA promptly reduces IRF. Cox TR. 41-42 (1/13/83). The existence and strength of this type of competition, implying as it does ease of entry into the market, together with the absence of abnormally high profits earned from VISA operations, (as testified to at trial), seems to preclude any compelling argument that VISA has market power. If VISA had any choice

in the matter it would certainly seem appropriate for it to reduce TRF in light of the evidence presented.

Building on the foregoing comments, the Court makes and enters these additional and somewhat more specific findings of fact:

A. VISA lacks power in the relevant market. In the absence of such market power, VISA lacks the ability to impose any restraint detrimental to competition.

1. The relevant market in this case is the nationwide market for payment systems.

(a) Both parties agree that the geographic market is nationwide.

(b) The relevant product market in this case is a market consisting of VISA and all payment services used in retail sales. This market includes VISA, MasterCard, T & E cards, merchants' proprietary cards,

merchants' open book credit, cash, travelers cheques, ATM cards, personal checks and check guarantee cards. None is a perfect substitute for a VISA card, but they are all quite good substitutes for each other and should be considered part of the same market. An examination of cross-elasticities of supply and demand demonstrates that the other payment services above are sufficiently close substitutes for the VISA card that they must be considered part of the same market.

B. VISA also competes in a market for the extension of credit to consumers. But NaBanco did not allege or contend that VISA had market power in the credit extension market, nor did it allege or contend that VISA or IRF had any anticompetitive effects in that market. That market includes other sources of

credit available from commercial banks, savings and loans, consumer finance companies, credit unions and competing cards such as MasterCard, department store proprietary cards and oil company cards. In the market so defined, VISA's share is less than 10% and VISA does not possess sufficient market power to effect an anticompetitive restraint.

C. There is no market for the "sale" of cardholder transaction ("cardholder paper") from merchant banks to issuing banks, and it would be meaningless to use such a market for purposes of analysis in this case. Only the member which issued a card has any interest in acquiring from merchant banks transactions effected by that card.

D. VISA has a very insignificant share and no real power, in the payment service market.

(1) VISA's share of the payment service market is certainly less than 5%, and likely less than 3%. This share is far too small to allow VISA to have any anticompetitive effect.

(2) In the opinion of NaBanco's expert, Dr. Cox, the new regional ATM debit card networks will force VISA out of business if VISA does not reduce IRF soon. The existence and strength of this competition means that VISA does not have market power.

(3) Still further confirmation of the fact that VISA and its members lack significant market power is the absence of any abnormally high profits earned from VISA card operations.

(4) NaBanco's own arguments concede VISA's lack of market power. In its trial brief, it recognized that VISA

and its members lack sufficient economic power over merchants to impose supra-competitive prices.

(5) Even if VISA currently had a large share of, and apparent power in, the relevant market, it still would not have market power because of the ease of entry into the market. There are no significant barriers to entry, particularly as a result of new technologies. The new ATM networks are an example of the easy entry into the marketplace. This ease of entry makes even more remote any possibility that VISA could impose an effective restraint.

(6) The fact that VISA and MasterCard set different IRF's during the early 1970's does not prove that either has market power. Rather, it confirms the existence of competition in the payment services market. On a

transaction of the average size during that period, the difference was approximately only 10%.

The Interchange Fee is Pro-Competitive in Nature

IRF promotes the efficiency and competitiveness of VISA in two other related ways. The first, is of vital import to the day-to-day functioning of the system. As established, IRF eliminates the costly uncertainly and prohibitive time and expense of "price negotiations at the time of the exchange" between the thousands of VISA members. See Central Iowa Power Cooperative v. Federal Energy Regulatory Commission, 606 F.2d 1156, 1163 (D.C. Cir. 1979) (establishment of price is necessary to the functioning of the cooperative and "to ensure that costs and benefits of the power pool will be shared fairly and predictably.") In doing so, it guarantees

the universal acceptability that is at the heart of the competitive success of the product.

The second way in which the fee promotes efficiency and competitiveness is in a more long-term economic sense. Briefly, the theory is that the parties to a national bankcard system must distribute the costs of the system in relation to prospective benefits so as to encourage members to engage in the appropriate balance of card-issuing and merchant-servicing. Far from being presumptively anticompetitive, the economics of bankcard pricing suggest that a "transfer payment" such as the IRF is precisely what one would expect to find in a bankcard joint venture seeking to price competitively in the payments systems market.

In the VISA "joint venture," both issuer and merchant banks perform essential roles, and both perform

necessary tasks for the benefit of each other, which must be performed if the basic payment service is to be offered. As stated earlier, the more cardholders in the system, the more attractive the system is to merchants. At the same time, the more merchants in the system, the more attractive the card is to cardholders. In short, there is a fundamental economic interdependence between card issuing and merchant signing in the system. Edwards. TR. 9-11 (6/3/83); Baxter (6/2/83) (dep. 2 at 18-21); Ashby. TR. 1621-23 (9/15/82); Guth TR. 8 (1/18/84).

This fundamental interdependence can be felt within the system in two ways. First, the more cardholders in the system, the more attractive the card is to merchants, and the more merchant discount revenue is generated for merchant banks. As more merchants enter the system, and more cardholders develop, more cardholder

revenue is generated for issuers. Second, as to the expense of operation, costs that the issuer banks bear, such as fraud or float costs or the costs of issuing the plastic, benefit the merchant and merchant bank in that they facilitate and encourage use of the cards at merchant locations. Similarly, the processing costs borne by the merchant banks are valuable to issuer banks. Edwards. TR. 9-11 (6/3/83); Cox. TR. 4-10, 75-77 (1/14/83); Bull. TR. 971-74 (5/15/82); Ashby. TR. 1604-10 (9/15/82).

Viewed from the perspective of the members then, for the VISA service to exist at all there must be members willing to issue cards and members willing to sign merchants. This system of interrelationships can be represented diagramatically as in Appendix I.

As asserted at trial, however, at the same time these interrelationships exist between the cardholder and merchant sides of the VISA business, there also exists a serious cost imbalance between the two sides. VISA has contended, and the evidence suggests, that the card-issuing side of the payments business bears the substantial majority of the costs of the business, up to 88% of total system costs. Edwards. TR. 13-15 (6/3/83); Cox. TR. 55-61 (1/14/83). Notably, the issuing side bears most of the float costs and most of the credit and fraud losses. Bull. TR. 907-17 (5/14/82); Edwards. TR. 13-15 (6/3/83). These costs are incurred on the issuing side by reason of VISA rules such as the rule which requires the issuer to pay the merchant bank for a transaction even if the cardholder never

pays because such costs can be managed and controlled more efficiently by issuers. Edwards. TR. 13-15 (6/3/83).

There is nothing inherent in the system that suggests, much less guarantees, that the revenue stream that comes into the merchant bank from the merchant will correspond in its magnitude to the activity costs that must be incurred by the merchant bank. Similarly, there is nothing to suggest, much less guarantee, that the revenue stream that comes into the card issuing banks from the cardholder will be equal in magnitude to the activity costs that the issuer banks incur. IRF serves the function of re-distributing the costs of the VISA service more equitably between the merchant and card issuer sides, that is, it is a "transfer payment" of sorts. In the process, IRF "equillibrates" the supply and the demand for VISA services by

bringing the costs of the system in line with the revenues for each participating VISA member bank regardless of the role it plays, either merchant or issuer, in the VISA system. The economics of this analysis is depicted in diagrammatical terms in Appendix II.

Re-distribution is perhaps not the only alternative theoretically available to VISA to achieve this equilibrium, but it is the most, if not the only, realistic alternative. For example, VISA might attempt to meet the cost imbalance problem by suggesting to issuer banks that, where they can legally, they further raise the price of issuing a card, or charge a fee for the cardholder's float period. The evidence produced at trial, however, suggests that cardholder demand for cards drops off dramatically when yearly fees are raised. In addition, many state

banking regulations have prohibited and continue to prohibit charging cardholders for the float period.

NaBanco has offered another alternative; private negotiation of individual "IRFs" which, initially at least, presents an interesting alternative. Again, in theory, private contracts between issuer and merchant banks would enable these banks to set a charge for IRF which would reflect the actual, true "price" which an issuer would be willing to pay - a price which would hopefully reflect the true costs of interchange after subtracting the additional costs experienced by issuer banks alone but from which merchant banks benefits. Transaction costs in this type of system would no doubt be high and stultifying since each and every bank would have to somehow contract each every other bank with which it might have some

card business contact. Further, there is no evidence to suggest that any "market" at all exists at the level of (and between) issuer and merchant banks. If there is a "market," it is a monopsonistic one as there is normally only one issuer bank willing to "purchase" any particular merchant bank's receivable. While each and every issuer bank might not behave monopsonistically, the incentive is certainly there for opportunistic behavior by some issuer banks which would take advantage of the situation by trying to exact higher and higher fees from merchant banks. What VISA calls the "free rider" problem, would likely lead to the system's collapse as more and more issuer banks following this course of action led more and more merchant banks to drop out of the system.

VISA's own history provides the proof that is necessary to come to this conclusion. Prior to the IRF regulation, VISA members acted in their own individual self-interest, and contrary to the interests of the system as a whole, in their dealings relating to interchange fees. Banks acted in a similar fashion in charging interchange on checks in the late 19th and early 20th centuries. Baxter (6/2/83) (dep. 2 at 37-43). Even one of NaBanco's own witnesses, Ms. Ashby, could not deny that she might increase her bank's interchange fee if VISA no longer set IRF. Ashby. TR. 1501-03 (9/15/82).

Thus IRF enables VISA to exist as a viable competitor in the payment systems market. Even if it could be proved that a sub-market for receivables exists, IRF increases interbrand competition in line with the policies outlined in GTE and Sylvania.

IRF is Reasonably Cost-Related

The persuasive evidence at trial suggested that IRF developed as a cost-related mechanism. VISA has spent thousands of dollars and hundreds of hours choosing a methodology which attempts to "average" out those costs associated with interchange and card issuing. Further the methodology itself has undergone drastic changes from time to time.

Even from a purely theoretical standpoint, VISA has every incentive to set IRF at a level which establishes an equilibrium between the issuer and merchant sides of its operation. First, those members who are members of the VISA Board and therefore responsible for setting IRF invriably represent banks which both issue cards and sign up merchants.

Second, since the fee is only charged within the system, it is always a net "zero" to the VISA venture as a whole because dollar received by or on behalf of VISA member X is paid to on or behalf of member Y. Third, VISA members always have the option of altering the "mix" of their business between merchant and issuing activity. Finally, and perhaps most importantly, if consumer and merchant utilization must somehow be equalized reducing demand by increasing merchant costs will necessarily reduce issuer demand and consequently reduce revenue opportunities on the issuing side of business.

Nevertheless, NaBanco has attacked VISA's IRF methodology as inadequate and unscientific and, as a result, "overbroad." Specifically, NaBanco has challenged the particular elements which go into the formula by which VISA

calculates "average" issuer bank costs. For example, NaBanco has challenged the fact that neither merchant nor issuer banks revenues are included in analyzing the fee level set by VISA, and that merchant bank costs are also not considered. This, NaBanco has argued, necessarily puts the entire financial burden of providing the "convenience use" period, for example, on the merchant banks - unfairly so NaBanco has claimed because 'revolving account' cardholders allegedly subsidize issuer banks for the costs associated with the float or convenience use period.

NaBanco has also attacked the "sampling" methodology used by VISA to determine which banks will be part of the larger, extended study by which VISA determines average costs. NaBanco has contended that VISA should use random

sampling techniques to choose its sample banks, not the "purposeful" sampling engaged in by VISA.

The court finds that, contrary to NaBanco's arguments, the specific means used to calculate IRF - the theory used to set it and the implementation of that theory - while certainly not perfect, was and is careful, consistent, and within the bounds of sound business judgment. The cost reimbursement methodology in effect since 1973 was designed and recommended to VISA by Arthur Andersen after VISA solicited the advice of that accounting firm. Andersen was given free rein to design any appropriate methodology, both in 1973 and in its review of the VISA methodology in 1980. Friedman. TR. 15-18 (6/8/83); Stock. TR. 93-94 (1/5/83). Arthur Andersen carefully considered alternative methods for computing IRF, even some which have been suggested by

NaBanco such as interchange at par. At the behest of VISA Arthur Andersen re-evaluated IRF methodology in 1977. Each time, Arthur Andersen concluded and VISA agreed that a cost-based methodology using systemwide average costs was preferable to any other. Friedman. TR. 15-18 (6/8/83), TR. 7-8 (6/9/83).

IRF was designed to perform the equilibration function the court described earlier. Edwards TR. 73-76, 79-81 (6/3/83); Weil 31, 50-51 (1/9/84). It embodies the same analysis that a single firm such as American Express would conduct in order to allocate costs between its cardholder and merchant divisions were it to divide its business between the two. Weil. TR. 38-47 (1/9/84). These findings are true of both the 1973 and the 1981 methodology, even though the 1981 methodology contains refinements not present in the 1973 formula.

Similarly, the selection of the banks to be studied by Arthur Andersen is a careful process which yields banks that are, within limits, representative of the VISA system as a whole. VISA first examines the results of cost "questionnaires" made available to each member bank. Next it selects from these five or six banks which appear to be representative of all member banks based on a number of factors, most particularly whether their per-unit costs are typical of the system as a whole. Schmidt. TR. 176-78 (6/9/83); Wecker. TR. 73 (1/11/84). This selection process is then reviewed and approved by Arthur Andersen before the banks are actually visited by the accounting firm for further study. Schmidt. TR. 176-78 (6/9/83). While it may be that, in the best of all worlds, random sampling would yield the most "accurate" results, and study and

evaluation of each and every bank in the VISA system even better ones, the sampling technique employed by VISA is certainly adequate in light of the costs associated with system-wide evaluation. In fact, VISA's sampling technique seems to produce a more accurate result than does random sampling. Wecker. TR. 80-83, 100-108 (1/10/84), 100 (1/11/84); Exhibit 2810. If anything, the banks selected by VISA are representative of banks with slightly lower than average costs resulting in an IRF which is lower in amount than one of each banks true costs. Wecker. TR. 109-110 (1/10/84).

CONCLUSION

Plaintiff, NaBanco, having been conceived in and nourished by the enterprise it presently attacks, now finds one of the stabilizing mechanisms of that enterprise legally offensive. NaBanco seeks injunctive and damage relief,

contending that the interchange fee, and particularly the manner of its setting, are both anti-competitive and in violation of the Sherman Act. Indeed, the plaintiff contends that the fabric under which it became successful is so faulty that it merits per se treatment and swift demise.

Because of the findings of fact and related conclusions of law previously set forth - perhaps with prolixity justified only by the desire to make a complicated and important point evident - the court rejects plaintiff's position and will enter judgment for defendant; not however, before some additional conclusory remarks.

The focal point of the case, the VISA interchange fee, was the product of turmoil created by the absence of an efficient method of transferring (distributing) costs incident to card

issuing and merchant servicing functions in the early days of what became the present VISA system.

Considerable evidence was presented concerning the etiology of the IRF, the nature of VISA, the complicated method of setting the fee, the selection of banks for testing, the operation of NaBanco, the experience of various banks and bankers involved with VISA, MasterCard and NaBanco, as well as on other relevant points in issue. Both parties were well prepared and effective in presenting their positions. However, as the trial progressed, and upon consideration of the totality of the evidence, it became increasingly clear not only that the plaintiff had not presented the more convincing and weightier evidence, but rather than the greater weight - the more convincing evidence - had been provided by defendant.

The present VISA business arrangement is relatively young. While describing it as a "joint venture" may be overly ambitious in the strict business organization sense, the term seems fairly applied from the anti-trust standpoint. The venture soon became aware that the "universality" of acceptance so vital to the system could not be achieved without a uniformity of regulation which included a non-divisive method of distributing costs. The more convincing evidence was that the mandated interchange fee (for the use of Base II) was necessary to achieve stability and thus universality; that to require exchange at par or remove the fee to permit negotiations for interchange charges among issuer and merchant banks would result in loss of competitiveness and chaos with the eventual destruction of the enterprise.

Indeed, one questions how much expertise is necessary to envision the consequences of literally thousands of issuer and merchant banks negotiating exchange fee contracts or ad hoc agreements for the purchase of specific paper where there is no contract. The problem is stated: "A" - who has a card issued by a Miami bank visits a San Francisco store, whose bank has no exchange with the Miami bank. The Miami customer would simply be unable to use his card. Understandably, the store owner would accept only those cards authorized by his merchant bank. Universality is gone, and the enterprise is no longer competitive.

The argument that banks would eventually work out a par exchange is not borne out by VISA history. Different and more extreme methods of cost transfer (even if permitted in all states) would

apparently impede the functioning of the system, rendering it less efficient, and thus less competitive.

The IRF serves to shave substantial costs and risks between VISA members and interchange transactions are an integration because in such transactions two different members combine their activities in order to offer a service to a cardholder and merchant. I conclude that to do violence to the method of setting the exchange fee would do violence to the functioning of the system.

IRF should be analyzed under the rule of reason because it is an agreement on the terms of interchange necessary for VISA to market its product and be an effective competitor. Prohibiting IRF would therefore undermine "interbrand" competition, "which is the primary concern of the anti-trust law." Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36,

52 n. 19, 97 S.Ct. 2549, 2558 n. 19, 53 L.Ed.2d 568 (1977). Even if IRF were not necessary to market the product, it should be analyzed under the rule of reason because it is an agreement internal to a type of joint venture which yields efficiencies beneficial to competition, that its members, acting alone, could not offer, and which allows the venture to offer a product which is different from, and greater than, the sum of the individual products of its members.

VISA's establishment of an IRF, whether of not it is literally "price fixing", is not "price fixing" in any meaningful sense of the word or in a sense which makes it a per se violation of the Sherman Act. Price fixing generally refers to an agreement on prices which otherwise would be set by market forces. However, market forces could not set IRF for a number of reasons, most notably the

likelihood of opportunistic, free rider behavior of the type identified by the Supreme Court when it eschewed per se analysis in Continental T.V. Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977).

In addition, IRF is properly analyzed under the rule of reason because it is not mandatory. Acting on behalf of its principals, NaBanco is and always has been free to negotiate different terms of interchange, and VISA issuers have been willing to make alternate arrangements. A practice is not unlawful per se where, as in this case, there is no legal, practical or conspiratorial impediment to making alternate arrangements.

BMI and Maricopa do not require the Court to make a subjective judgment as to whether a joint venture's product is "unique." Rather, they call for the Court to compare the product of the venture to

the individual offerings of the venture's members and determine whether the venture offers pro-competitive utilities which its members, acting alone, could not offer.

The burden of proof in a rule of reason case rests with the plaintiff. The rule of reason requires "a systematic comparison" of the negative effects of the restraint on competition, if any, with any alleged positive effects on interbrand competition stemming from the restraints. In order to prevail, NaBanco has the burden of establishing that the anti-competitive effects of the setting of the IRF decidedly outweigh the pro-competitive benefits of the practice. It must show that the effects of the restraint were "substantially adverse," and that the adversity falls on market competition and not merely on its own business.

To establish anti-competitive effects, NaBanco must prove that VISA has power in a relevant market. In order to establish such power NaBanco must begin by offering proof of "a well defined relevant market upon which the challenged anti-competitive actions would have a substantial impact." (Graphic Products, supra at 1569). NaBanco must then establish market power. (The ability to raise price significantly above the competitive level without losing all of one's business; Graphic Products, at 1570; the ability to raise prices above those which would be charged in a competitive market. Jefferson Parish Hosp. Dist. v. Hyde, ___ U.S. ___, n.46, 104 S.Ct. 1551, 80 L.ED.2d 2). Plaintiff has failed to establish its view of a relevant market and the court has found payment services to be the relevant market. In this market, VISA has little power. Even if

this market definition were incorrect and VISA had short run power over price, it still would have no long-run monopoly power because there are few barriers to entry. Indeed, one of plaintiffs' experts predicted the demise of VISA due to competitive innovations, if VISA persists in maintaining the IRF.

Further, even if NaBanco had established that VISA had power in a relevant market and that IRF had substantial anti-competitive effects, VISA established that IRF is necessary to offer the VISA card - a pro-competitive benefit which offsets any anti-competitive effects. In a rule of reason inquiry, the Court must evaluate the alternatives to the challenged practice as part of its weighing of the practice's pro-competitive effects. Although some cases place the burden on the plaintiff to establish that a realistic, viable and more pro-

competitive alternative to the challenged practice exists, this court need not address the burden of proof issue. Assuming that the burden were VISA's, VISA met that burden.

Can it be said, in the factual setting presented here, that the IRF is a "market restraint of trade with no purpose except stifling of competition." White Motor Co. v. U.S., 372 U.S. 253, 83 S.Ct. 696, 9 L.Ed.2d 738. I find, as a matter of fact and law that it is not, but rather, to borrow from BMI and Realty Multi-List, a method of integrating costs and risks which aids in the marketing of the product and permitting the public to utilize the service with such benefits as it may yield.

Judgment will this day be entered for defendant by separate order.

APPENDIX 1

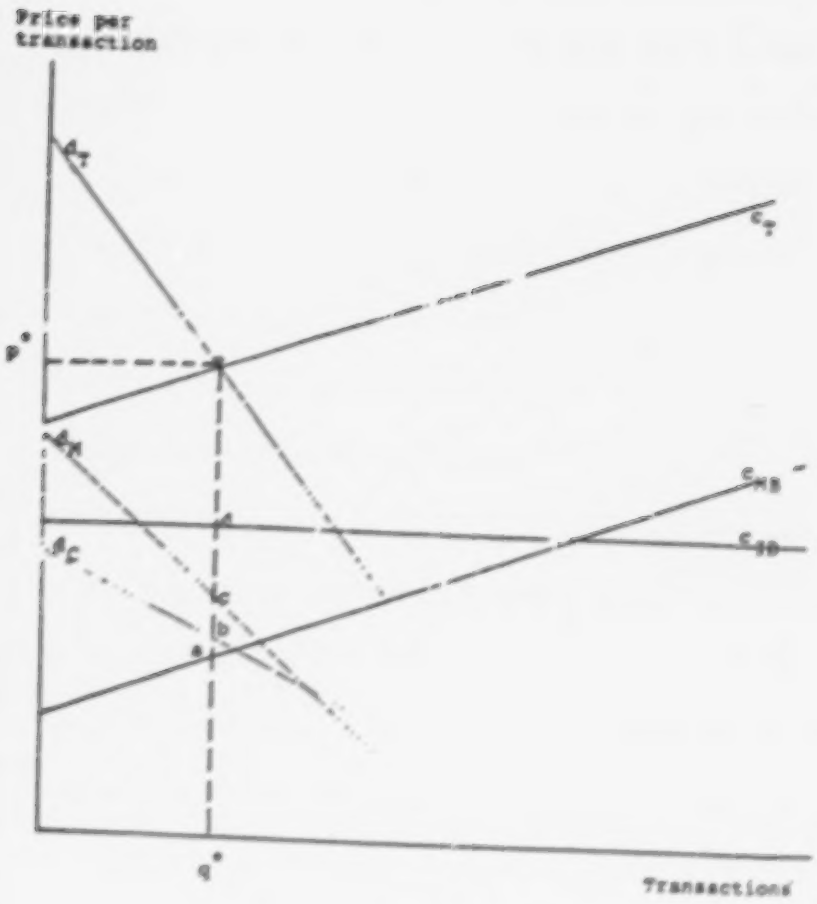
(1) Figure 1 depicts the resulting demand-supply equilibriums when various demands by cardholders (dC), merchants (dM), and the system as a whole (dT) are superimposed on a graph representing the various marginal cost curves existing in the VISA system. The resulting price and quantity at the equilibrium (e) representing the intersection of dT and cT are equal to p* and q*.

The need for a transaction or interchange fee can be demonstrated by comparing the various line segments composing the dotted line q*e. In the process of producing an industry output of q*, merchant banks incur marginal costs in the amount of q*a and issuer banks incur marginal costs in the amount of q*d. The sum of these two sets of costs is q*e. In consideration for transactional services to facilitate q* exchanges, cardholders are willing to make expenditures in the

amount of q*b and merchants are willing to make expenditures in the amount of q*c. The sum of these two revenue streams is q*e . What is important to note is that the marginal cost q*d of the activities performed by the issuer bank bears no necessary relation to the amount of revenue q*b forthcoming from the cardholders with whom these banks have contractual relationships. Similarly, the costs q*a associated with the activities performed by merchant banks have no necessary relation to the amount of revenue q*c forthcoming from the merchants with whom they have contractual relationships. The sum of the two revenue streams, however, must equal the sum of the two cost streams for the system to survive. Thus, whenever the revenue coming into a member bank does not match its costs, there must be some side or transfer payment from either the merchant

or the issuer bank to bring the receipts of each bank into balance. In the diagram, this transfer payment is represented by the line segment ac which exactly equals the surplus coming into the merchant bank depicted by line segment ac and the issuer bank's deficit depicted by line segment bd.

It should be noted that the position or shape of these lines are not based upon any particular "empirical" evidence. The lines are simply drawn in accordance with testimony presented by VISA at trial suggesting that BM revenues are greater than BI's revenues in the VISA system and that dC drops off considerably as prices rise. The important point is that so long as revenues to either issuer or merchant bank do not equal the costs to each of these banks, there will be a need for some kind of transfer payment.


Price per transaction
A_T
C_T
p^*
A_N
C_{MB}
C_{SD}
A_C
c
b
a
q^*
Transactions

APPENDIX 2

(1) Figure 1 illustrates the derivation of aggregate demand (dT) for transactional services of a given type in a single-merchant, single-cardholder economy. The quantity (q) axis is calibrated in units which represent the bundle of services that must be provided by VISA member banks and their agents to both the cardholder (C) and the merchant (M) in order to facilitate the execution of one exchange of goods or services between cardholder and merchant. The price (p) axis represents the payments to member banks necessary to induce the requisite supply of services for any particular transaction.

Independently, neither cardholder or merchant necessarily confronts any particularly price as the one he must pay in order to have his demand (dC) or (dM) fulfilled. Thus, the individual demand

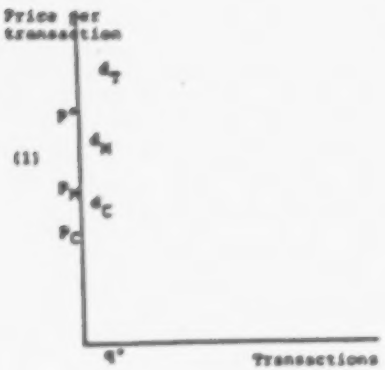
curves of cardholder and merchant are drawn separately, each clearly demonstrating a different price (PC) or (PM) which the cardholder or merchant is willing to pay for some level of services (q*); i.e., for any particular point on the combined demand curve, PC does not equal PM but their combined demand will be manifested by the price (p*) and quantity (q*) in this example.

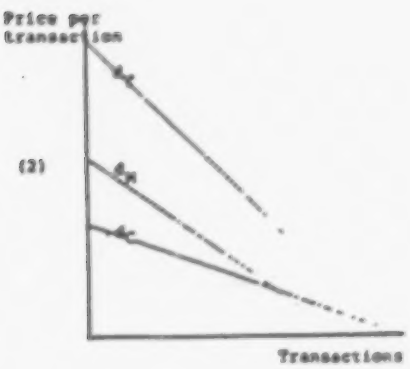
(2) Figure 2 is similar to Figure 1 except that it is intended to represent total demand (dT) of all participating cardholders and merchants. While the individual demand schedules of particular cardholders must be aggregated vertically to reach a well-defined expression of aggregate demand for transactional services in a miniature economy, total cardholder demand and total merchant demand are first summed horizontally to get total aggregate demand in a multi-

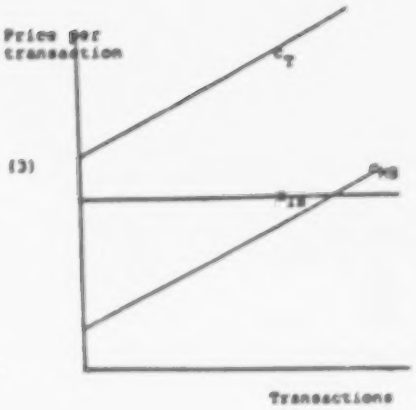
cardholder/multi-merchant economy. This is because cardholders only trade with merchants and vice versa. Cardholders and merchants do not trade with other members of the set they represent.

(3) Figure 3 illustrates that relationships corresponding to that of cardholder and merchant on the demand side exist on the supply side as well. The cardholder has his banking relationship with one institution (IB) and the merchant typically has his with another bank (MB). Different tasks are performed for the cardholder than for the merchant. These different tasks mean different marginal costs ((cIB) or cMB) for each bank for any particular transaction. Figure 3 depicts possible marginal cost curves for issuer banks and merchant banks, together with their vertical aggregation (cT) which corresponds to the total marginal cost per exchange facilitated by the two banks

participating in that exchange. As was the case in Figure 2, Figure 3 represents the marginal cost curves one might expect in a multi-card-holder/multi-merchant economy.


Price per transaction
d_T
p^c
d_M
(1)
p_M
d_C
p_C
q^*
Transactions


Price per transaction
d_T
(2)
d_M
d_C
Transactions


Price per transaction
c_T
(3)
p_{MB}
p_{IB}
Transactions

NATIONAL BANCARD CORPORATION
(NaBANCO), a Florida Corporation,
Plaintiff-Appellant,

v.

VISA U.S.A., INC.,

Defendant-Appellee.

No. 84-5818

United States Court of Appeals,
Eleventh Circuit.

Jan. 10, 1986.

Appeal from the United States District Court for the Southern District of Florida.

Before JOHNSON and HENDERSON, Circuit Judges,
and ALLGOOD,* District Judge.

HENDERSON, Circuit Judge:

National Bancard Corp. (NaBanco) filed this suit against VISA U.S.A. (VISA), alleging that VISA violated Section 1 of the Sherman Act, 15 U.S.C. § 1, by fixing certain bank credit card

* Honorable Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama, sitting by designation.

interchange rates. After a bench trial that consumed approximately nine weeks, the United States District Court for the Southern District of Florida, in an exhaustive opinion, concluded that NaBanco failed in its efforts to prove a violation of the antitrust laws. See National Bancard Corp. v. VISA, U.S.A., 596 F.Supp. 1231 (S.D. Fla. 1984) (hereinafter cited as NaBanco).

NaBanco appeals from this judgment, claiming that the district court erred in applying the rule of reason rather than the per se rule to the facts of the case. Alternatively, NaBanco contends that even under a rule of reason analysis VISA's conduct was violative of Section 1 of the Sherman Act.

The factual background to this case revolves around the workings of the bank credit card industry in general and VISA's

operational procedures in specific.[1] Bank credit card transactions generally can involve four different entities: (1) cardholders who use the cards to purchase goods and services; (2) merchants who accept the cards in exchange for goods and services; (3) banks that issue cards to cardholders (card-issuing banks); (4) banks that contract with merchants to accept the credit cards (merchant-signing banks). In some instances only three parties are implicated because the card-issuing bank also contracts with the merchant to accept the card.[2]

1/ The district court's opinion provides an interesting and detailed history of the American credit card business and other payments systems. See NaBanco, 596 F.Supp. at 1236-38 & nn 4-8.

2/ These three-party dealings generally are known as "on-us" transactions. Since no interchange occurs, no fee is charged in "on-us" purchases. VISA's precursor, BankAmericard, was purely a three-party bank card because cards were issued and merchants were recruited only by Bank of

(footnote continued)

In a typical four-party transaction, a consumer is issued a bank credit card by a card-issuing bank, Bank X. A merchant-signing bank, Bank Y, contracts with a shopowner to joint the VISA network and accept the VISA card. The cardholder then uses the card to purchase goods from the merchant, who furnishes the cardholder with the merchandise and then sends the cardholder's charge receipt (the paper) to Bank Y, the bank with which the shopowner has signed a VISA contract. Bank Y "buys" the paper from the merchant pursuant to their contract, but at less than face value. This discounted amount is known as the "merchant discount." Bank Y then must "interchange" the paper with Bank X so

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(footnote continued from previous page) America. The BankAmericard gave way to VISA in 1977. "On-us" transactions often occur even when several banks issue cards and sign merchants because the same bank that issued the card may have signed the merchant to accept the card. Obviously, this would occur most often in a card-issuing bank's surrounding community.

that Bank X can bill the cardholder in accordance with the term of their contract.

The difficulties in the credit card or "cashless" transaction arise because each such transaction generates a trail of paperwork. This transactional paper representing the exchange is transferred among the parties until each eventually bears the burden that it has contracted to assume. This case concerns certain fees that attach in the transfer, or interchange, of this paper between the merchant-signing bank and the card-issuing bank.

The present action arose as a result of the "Issuer's Reimbursement Fee" (IRF) that the VISA system imposes when the merchant-signing bank forwards the cardholder's paper to the card-issuing bank for collection. In the VISA system this fee, a small fixed percentage of each

charge, is levied only when the interchange is conducted through VISA's computerized service known as BASE II. Significantly, the parties to the interchange are not required to use BASE II. Merchant and issuer institutions are free to negotiate a different rate and bypass the BASE II system entirely.

In today's technology, the majority of these transactions are automated, so that the banks' and merchants' computers actually credit each others' computerized accounts. The effect, however, is the same as if each party were to present the paper in person and receive cash in exchange.

For the merchant-signing bank to profit from its middleman position, the payment it receives from the card-issuing bank must be greater than the discounted amount the merchant bank originally paid the merchant. In practical terms, the IRF may

not exceed the merchant discount for the merchant-signing bank to benefit from the transaction. Because each merchant-signing bank negotiates the amount of its discount with the merchant, each may ensure that it maintains such a profit margin by setting the merchant discount accordingly.

On the other hand, the card-issuing bank is responsible for collecting all sums due and payable by its cardholders. All risk of loss resulting from nonpayment, default or any other reason falls solely on the issuer bank. Additionally, until recently, card-issuing banks did not charge an annual user fee to each cardholder for fear of losing patrons to competing bank cards that made no such charge. The card-issuing banks also traditionally have provided a so-called "convenience period" for their customers. This period, usually comprising several

weeks, allows cardholders to avoid any interest payments if their account is paid in full before the next billing cycle - in effect an interest-free loan.

The IRF ostensibly is designed to shift to the merchant-signing bank some of the costs - from risk of loss, lack of user fee, and convenience period expense - that fall solely on the card-issuing banks. NaBanco contends that this practice constitutes horizontal price fixing and is therefore a per se violation of Section 1 of the Sherman Act. NaBanco further asserts that even if the rule of reason is invoked, VISA's IRF is unreasonably anticompetitive. VISA, however, maintains that the BASE II IRF helps create a product that could not exist otherwise and therefore is neither subject to traditional per se attack nor in contravention of the Sherman Act when subjected to rule of reason evaluation.

The purpose of the IRF, and the basis of NaBanco's attack on it, are intertwined in the development of BankAmericard, VISA, and NaBanco.3/ The Bank of America (BA) originally marketed the three-party BankAmericard on a statewide basis in California. In 1966 BA decided to expand its system nationwide by licensing local banks to use the BankAmericard name, thereby making BankAmericard a four-party transaction. As part of the new national system, a variable interchange fee system was created. Each merchant-signing bank was required to inform the card-issuing bank of either the actual or average merchant discount it charged. The fee was based on this information.

3/ For an in-depth background of the parties, see NaBanco, 596 F.Supp. at 1238-40.

After the original BankAmericard network expanded, the variable interchange fee system did not work effectively. A for-profit nonstock-membership corporation, NBI, was therefore formed in 1970. NBI's board of directors adopted a new uniform fee system, the IRF, in late 1971. NBI became VISA in 1977.

VISA, which included over 13,000 members in 1983, has two types of membership. "Proprietary" members both issue cards and sign merchants. In 1983 they made up approximately 14% of all VISA members. "Agent" members choose only to sign merchants to participate in the VISA system. The sole significant difference between proprietary and agent members is that only proprietary members may vote, or serve on, VISA's board of directors. Thus, agent members have no input in determining VISA policies, including the existence and amount of the IRF. It is

important to note that VISA members voluntarily chose the type of membership they desire and may elect to issue cards and thereby gain a voice in the VISA decisionmaking process. The various members also compete vigorously against one another to issue cards and sign merchants.

NaBanco does not belong to the VISA system. It serves as a processing agent for VISA members and receives all or part of the merchant discount of the VISA member to whom it provides a processing service. For purposes of this decision, however, NaBanco stands in the exact position of an agent member.4/

4/ NaBanco cannot be a member of VISA because it is not eligible for federal deposit insurance. Nevertheless, NaBanco acts as a processing agent for merchant-signing VISA members. As such, it receives the cardholder paper from merchants, reimburses merchants, and then exchanges the paper with the card-issuing banks. NaBanco also has served as an agent of card-issuing VISA members.
(footnote continued)

NaBanco's basic complaint is that the IRF reduces or eliminates its ability to compete with proprietary VISA members that both issue cards and sign merchants. Because "on-us" transactions (in which the card-issuing and merchant-signing bank is the same) involve no interchange, and therefore are not subject to the IRF, proprietary members conducting "on-us" transactions can reduce the merchant discount they change. NaBanco alleges that it is unable to compete because it must keep its merchant discount higher than the IRF to ensure a profit. Merchants therefore do not choose to contract with NaBanco because they receive

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(footnote continued from previous page) NaBanco, 596 F.Supp. at 1239-40. The district court properly held that NaBanco had standing to pursue this antitrust action. Id. at 1241-47.

a better merchant discount from proprietary VISA members. See NaBanco, 596 F.Supp. at 1240.

Because both "on-us" and IRF transactions involve many of the same costs, NaBanco claims that by reducing the merchant discount in "on-us" transactions, proprietary VISA members demonstrate that the IRF is not cost related. According to this argument, the IRF is either unnecessary or intentionally set at a level to discourage purely merchant-signing competitors. When NaBanco seeks to sign and service merchants, it competes with merchant-signing banks that also issue VISA cards. NaBanco alleges that banks that also issue cards have set the IRF to keep purely merchant-signing banks from being able to compete. Therefore, in NaBanco's view these proprietary members are equivalent to a group of competitors who have agreed to sell goods to each

other (or, in this case, to themselves) at a lower rate than that offered to NaBanco. NaBanco urges that, because the individual card-issuing and merchant-signing banks individually can and should negotiate the interchange fee, the IRF system, as constituted, amounts to horizontal price fixing and is per se violative of Section 1 of the Sherman Act.

As stated earlier, NaBanco essentially challenges (1) the district court's application of the per se rule, and (2) its finding that the IRF is procompetitive under the rule of reason.

Findings of fact by the district court may be reversed only when they are clearly erroneous. Fed.R.Civ.P. 52(a). The reviewing court, looking at all the evidence, must be "left with the definite and firm conviction that a mistake has been committed." United States v Gypsum, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92

L.Ed. 746, 766 (1948). "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it. . . . Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." Anderson v. Bessemer City, 470 U.S. ___, ____, 105 S.Ct. 1504, 1512, 84 L.Ed.2d, 518, 528 (1985). This standard governs the district court's findings on the second issue.

Errors of law are freely reviewable and not protected by the clearly erroneous rule. See Pullman-Standard v. Swint, 456 U.S. 273, 287, 102 S.Ct. 1781, 1786, 72 L.Ed.2d 66, 79 (1982). Whether to apply a per se or rule of reason analysis is a question of law, and therefore freely reviewable, yet it is predicated on a factual inquiry into the restraint's competitive effect. See NCAA v. Board of

Regents of University of Oklahoma, 468 U.S. ____, ____, 104 S.Ct. 2948, 2962, 82 L.Ed.2d 70, 85 (1984) ("the essential inquiry remains the same - whether or not the challenged restraint enhances competition."). As the Supreme Court has noted, "no bright line separat[es] per se from Rule of Reason analysis." Id., 468 U.S. at ____ n. 26, 104 S.Ct. at 2962 n. 26, 82 L.Ed.2d at 86 n. 26.

It is axiomatic that Section 1 of the Sherman Act, if read literally, would strike down every contract. NCAA, 468 U.S. at ___, 104 S.Ct. at 2959, 82 L.Ed.2d at 82; Chicago Board of Trade v. United States, 246 U.S. 231, 238, 38 S.Ct. 242, 244, 62 L.Ed. 683, 687 (1918); Abadir & Co. v. First Mississippi Corp., 651 F.2d 422, 425 (5th Cir. 1981).5/ The Supreme

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5/ In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc), this court adopted as precedent all decisions of the former Fifth Circuit Court of (footnote continued)

Court, however, "repeatedly [has] recognized [that] the Sherman Act was intended to prohibit only unreasonable restraints of trade." NCAA, 468 U.S. at __, 104 S.Ct. at 2959, 82 L.Ed.2d at 82; see National Society of Professional Engineers v. United States, 435 U.S. 679, 687-88, 98 S.Ct. 1355, 1363, 55 L.Ed.2d 637, 648 (1978) (hereinafter cited as Engineers).

To provide the needed flexibility to Section 1, the courts adopted the rule of reason, which is grounded in the common law.6/ Engineers, 435 U.S. at 688, 98

(footnote continued from previous page) Appeals decided prior to October 1, 1981.

6/ The best common law basis for the rule of reason is Mitchel v. Reynolds, 25 Eng.Rep. 347 (1711). Mitchel involved the enforceability of a vendor's covenant not to compete with a vendee with respect to the sale of a bakery. The covenant was upheld as reasonable because it was ancillary to the contract, which was procompetitive. See Engineers, 435 U.S. at 688-89, 98 S.Ct. at 1363-64, 55 L.Ed.2d at 648.

S.Ct. at 1363, 55 L.Ed.2d at 648; Abadir, 651 F.2d at 425. The Supreme Court has clearly articulated that the rule of reason is the vehicle by which the Sherman Act - the "comprehensive charter of economic liberty," Northern Pacific Railway Co. v. United States, 356 U.S. 1, 4, 78 S.Ct. 514, 517, 2 L.Ed.2d 545, 549 (1958) - is to be implemented. See Arizona v. Maricopa County Medical Society, 457 U.S. 332, 343, 102 S.Ct. 2466, 2472, 73 L.Ed.2d 48, 58 (1982) (hereinafter cited as Maricopa); Engineers, 435 U.S. at 687-89, 98 S.Ct. 1363-64, 55 L.Ed.2d at 647-49; Chicago Board of Trade, 246 U.S. at 238-39, 38 S.Ct. at 244, 62 L.Ed.at 687; Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911). As this court's predecessor has held, the rule of reason is the "basic test for the legality of a business practice which

allegedly operates to restrain trade." United States v. Multi-List, Inc., 629 F.2d 1351, 1362 (5th Cir. 1980); see Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49, 97 S.Ct. 2549, 2557, 53 L.Ed.2d 568, 579-80 (1977) (hereinafter cited as Sylvania); Abadir, 651 F.2d at 425.

The rule of reason[7] necessitates an

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[7] The classic statement defining the rule of reason was provided by Justice Brandeis in Chicago Bd. of Trade, 246 U.S. at 238, 38 S.Ct. at 244, 62 L.Ed. at 687.

> The true test of legality is whether the restraint imposed is such as merely regulates or perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help

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"elaborate inquiry into the reasonableness of a challenged business practice." Maricopa, 457 U.S. at 343, 102 S.Ct. at 2472, 73 L.Ed.2d at 58. It therefore is a time-consuming process that entails significant costs. Id. Other difficulties constricting the use of the rule of reason include the general lack of judicial expertise in sophisticated economic analysis as well as the lack of certainty that such case law produces. Id.

Given these drawbacks to rule of reason scrutiny, the courts have developed a per se rule that applies a conclusive presumption that certain restraints automatically are unreasonable, and therefore illegal, without further

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the court to interpret facts and to predict consequences.

investigation.8/ The need for efficiency and certainty in effect outweigh specific fact settings in which an action held to be per se unreasonable might be decided differently under the rule of reason. See Maricopa, 457 U.S. at 344 & n 16, 102 S.Ct. at 2473 & n 16, 73 L.Ed.2d at 58 & n 16. In short, "[t]he per se rule is the trump card of antitrust law. When an

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8/ The per se rule was set forth by the Supreme Court in Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545, 549 (1958): "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." See Broadcast Music, Inc. v. Columbia Broadcasting Co., 441 U.S. 1, 8, 99 S.Ct. 1551, 1556, 60 L.Ed.2d 1, 9 (1979); Goldfarb v. Virginia State Bar, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975); United States v. Topco Assocs Inc., 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972); International Salt Co. v. United States, 332 U.S. 392, 68 S.Ct. 12, 92 L.Ed. 20 (1947); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940).

antitrust plaintiff successfully plays it, he need only tally his score." United States v. Realty Multi-List, Inc., 629 F.2d 1351, 1362-63 (5th Cir. 1980) (hereinafter cited as Multi-List).

The Supreme Court has recognized that "whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same - whether or not the challenged restraint enhances competition." NCAA, 468 U.S. at ___, 104 S.Ct. at 2962, 82 L.Ed.2d at 85-86. Thus, "no bright line separat[es] per se from Rule of Reason analysis. Per se rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct." Id., 468 U.S. at ___ n. 26, 104 S.Ct. at 2962 n. 26, 82 L.Ed.2d at 86 n. 26. Certain types of practices, however, have emerged as traditionally per se

violations. See United States v. Parke, Davis & Co., 362 U.S. 29, 80 S.Ct. 503, 4 L.Ed.2d 505 (1960) (vertical price fixing agreements); Timken Roller Bearing Co. v. United States, 341 U.S. 593, 71 S.Ct. 971, 95 L.Ed. 1199 (1951) (horizontal market divisions); International Salt Co. v. United States, 332 U.S. 392, 68 S.Ct. 12, 92 L.Ed. 20 (1947) (tying arrangements); Fashion Originators' Guild v. FTC, 312 U.S. 457, 61 S.Ct. 703, 85 L.Ed. 949 (1941) (group boycotts).

Until Broadcast Music, Inc. v. Columbia Broadcasting Co., 441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979) (hereinafter cited as BMI), horizontal price fixing consistently was held to fall in the per se category.9/ In BMI, however, the

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9/ "A price fixing agreement between competitors is the classic example of [a per se] arrangement." Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, ___, 104 S.Ct. 1551, 1556, 80 L.Ed.2d 2, 11 (1984). See Arizona v. Maricopa

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Supreme Court warned that "[l]iteralness is overly simplistic and often overbroad," id. at 9, 99 S.Ct. at 1557, 60 L.Ed.2d at 9, and refused to use the per se rule even though the Court held that the practice in question literally was price fixing.

(footnote continued from previous page) County Medical Soc'y, 457 U.S. 332, 102 S.Ct. 2466, 73 L.Ed.2d 48 (1982); Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 100 S.Ct. 1925, 64 L.Ed.2d 580 (1980); National Soc'y of Professional Engineers v. United States, 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978); Albrecht v. Herald Co., 390 U.S. 145, 88 S.Ct. 869, 19 L.Ed.2d 998 (1968); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed. 219 (1951); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940); United States v. Trenton Potteries Co., 273 U.S. 392, 47 S.Ct. 377, 71 L.Ed. 700 (1927); Amey Inc. v. Gulf Abstract & Tile, Inc., 758 F.2d 1486 (11th Cir. 1985); L.A.Draper & Son v. Wheelabrator-Frye, Inc., 735 F.2d 414 (11th Cir. 1984); Construction Aggregate Transport, Inc. v. Florida Rock Inds., Inc., 710 F.2d 752 (11th Cir. 1983); Joe Requeira, Inc. v. American Distilling Co., 642 F.2d 826 (5th Cir. 1981); P. Areeda, The Rule of Reason in Antitrust Analysis 22 (1981).

In BMI, Broadcast Music, Inc. (BMI) and the American Society of Composers, Authors, Composers and Publishers (ASCAP) issued blanket licenses to copyrighted music compositions. The fees for these licenses were set by ASCAP and BMI and clearly qualified as price fixing in a strict sense. BMI, 441 U.S. at 8, 99 S.Ct. at 1556, 60 L.Ed.2d at 9. The Court, however, noted that

> this is not a question simply of determining whether two or more potential competitors have literally "fixed" a "price." As generally used in the antitrust field, "price fixing" is a shorthand way of describing certain categories of business behavior to which the per se rule has been held applicable. The Court of Appeals' literal approach does not alone establish that this particular practice is one of those types or that it is "plainly anticompetitive" and very likely without

> "redeeming virtue." . . . Thus, it is necessary to characterize the challenged conduct as falling within or without that category of behavior to which we apply the label "per se price fixing."

Id., 441 U.S. at 8-9, 99 S.Ct. at 1556-57, 60 L.Ed.2d at 9-10. See Cha-Car, Inc. v. Calder Race Courses, Inc., 752 F.2d 609, 613 (11th Cir. 1985) ("The per se doctrine should not be extended to restraints of trade that are of ambiguous effect; any departure from the rule of reason standard must be based upon demonstrable economic effect, rather than formalistic line drawing."). Consequently, while some price fixing is per se illegal, other arrangements that literally fix prices are judged under the rule of reason.

In an effort to delineate which factors distinguish these categories, the Court went on to set out the analytic framework

for consideration. The "inquiry must focus on whether . . . the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive.'" BMI, 441 U.S. at 19-20, 99 S.Ct. at 1562-63, 60 L.Ed.2d at 16 (quoting United States v. United States Gypsum Co., 438 U.S. 422, 441 n. 16, 98 S.Ct. 2864, 2875 n. 16, 57 L.Ed.2d 854, 872 n. 16 (1978)). Because the blanket license was not a "'naked restraint of trade with no purpose except stifling of competition,' but rather accompanie[d] the integration of sales, monitoring and enforcement against unauthorized copyright use," it was not illegal per se. BMI, 441 U.S. at 20, 99 S.Ct. at 1563, 60 L.Ed.2d

at 16 (quoting White Motor Co. v. United States, 372 U.S. 253, 263, 83 S.Ct. 696, 702, 9 L.Ed.2d 738, 746 (1963)).

The blanket license in BMI was a practical necessity because it was virtually impossible for thousands of composers to negotiate individually over the use of each song, for each user to report amount of use, and for each composer to police the use of his works by authorized and unauthorized users. Thus, the blanket license arrangement "created a forum for buyers and sellers . . . and yielded improvements in the market for performing rights of copyrighted compositions which were unrelated to price." United States v. Southern Motor Carriers' Rate Conference, 672 F.2d 469, 479 (5th Cir. Unit B 1982), aff'd, 702

F.2d 532 (5th Cir. Unit B 1983) (en banc), rev'd on other grounds, 471 U.S. ___, 105 S.Ct. 1721, 85 L.Ed.2d 36 (1985).10/

BMI's underlying teaching therefore appears to be that courts should look to whether the restraint at issue potentially could create an efficiency enhancing integration to which the restraint is ancillary. In other words, the issue is whether the price fixing "achieve[s] purposes unrelated to price formation." Southern Motor Carriers, 672 F.2d at 479 (emphasis in the original), aff'd, 702 F.2d 532 (5th Cir. Unit B 1983) (en banc), rev'd on other grounds, 471 U.S. ___, 105 S.Ct. 1721, 85 L.Ed.2d 36 (1985). This analytic framework closely parallels the approach proposed by Professor, now Judge,

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10/ In Stein v. Reynolds Securities, Inc., 667 F.2d 33, 34 (11th Cir. 1982), the Eleventh Circuit Court of Appeals adopted as precedent all decisions of Unit B of the former Fifth Circuit Court of Appeals.

Robert H. Bork. See Bork, The Rule of Reason and the Per Se Concept: Price Fixing and Market Division, 75 Yale L.J. 373, 474 (1966) (no per se analysis if restraint "accompanies a contract integration" and "is ancillary to the contract integration").

As could be expected, defendants charged with horizontal price fixing ecstatically embraced BMI, viewing it as an alluring oasis of hope in a previously barren desert.11/ The Supreme Court,

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11/ BMI is just one of several cases that appeared to signal a retreat from rigid application of the per se rule. In Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. ___, 104 S.Ct. 1551, 80 L.Ed.2d 2 (1984), the Court refused to apply the per se rule summarily to a tying arrangement, instead noting that in-depth market analysis was required to determine the procompetitive aspects of the tie-in. See NCAA, 468 U.S. at ___, 104 S.Ct. at 2959-63, 82 L.Ed.2d at 85-89; Continental TV, Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977) (reversing an earlier holding that some types of vertical market division were per se violative; Court required more extensive evidence of economic utility of

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however, has refused to view BMI in such sweeping terms, instead declining to find it applicable to any and all subsequent litigants.12/

(footnote continued from previous page) the restraint). These cases demonstrate that "invocation of [the per se rule] must be limited to those situations which fairly fall within its rationale," rather than a formalistic approach. United States v. Realty Multi-List, Inc., 629 F.2d 1351, 1363 (5th Cir. 1980).

12/ For example, the Court twice rejected the Ninth Circuit's determination that antitrust defendants qualified for rule of reason analysis under BMI. See Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 102 S.Ct. 2466, 73 L.Ed.2d 48 (1982); Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 100 S.Ct. 1925, 64 L.Ed.2d 580 (1980). The Court also refused to extend BMI to the NCAA. See NCAA v. Board of Regents of University of Oklahoma, 468 U.S. ___, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984). Similarly, the former Fifth Circuit Court of Appeals addressed BMI's availability only on one occasion, and refused to find it applicable. See United States v. Southern Motor Carriers Rate Conference, Inc., 672 F.2d 469, 479-80 (5th Cir. Unit B 1982), aff'd, 702 F.2d 532 (5th Cir. Unit B 1982) (en banc), rev'd on other grounds, 471 U.S. 105 S.C. 1721, 85 L.Ed.2d 36 (1985).

In this case the district court held that the IRF qualified for rule of reason treatment under BMI. NaBanco, 596 F.Supp. at 1252-56. Whether the IRF charged by VISA is price fixing[13/] subject to the per se rule, depends in large part on how BMI

13/ From an economist's viewpoint, the VISA IRF may not even qualify as a "price," because it would be driven upward by unrestrained competition. See Baxter Deposition, Vol. I, at 57 (Feb. 25, 1981). Professor Baxter, who appeared as a witness for VISA, subsequently published his research in bank transactional paper. See Baxter, Bank Interchange of Transactional Paper: Legal and Economic Prospectives, 26 J.L. & Econ. 541 (1981). The article includes an excellent explanation of the economic arguments favoring an interchange fee of some sort. It concludes that the economics of the system indicate that interchange fees are not horizontal price fixing, but rather act as equilibratory devices necessary to avoid "chaotic results . . . higher fees and instability within card systems." Id. at 586. In Baxter's opinion, such a fee is legally valid so long as all members of a four-party payment system have the option to bypass the required fee and negotiate their own fee. Id. See In re UATP - 1976, 85-11 C.A.B. 2481, 2506 (1980). As mentioned earlier, the Base II system is not mandatory and may be bypassed if the VISA members so choose.

is analyzed and applied. Unfortunately, subsequent cases have left us without clear standards for determining the application of the per se rule in price fixing cases.

In Catalano, Inc. v. Target Sales Inc., 446 U.S. 643, 100 S.Ct. 1925, 64 L.Ed.2d 580 (1980), the Court reversed the decision of the Ninth Circuit Court of Appeals that beer wholesalers who agreed to stop extending credit to beer retailers had not committed a per se violation of Section 1. The Court concluded that granting an interest free credit period was the equivalent to a discounted price for that period of time and thus "must be characterized as an inseparable part of the price." Id. 446 U.S. at 648, 100 S.Ct. at 1928, 64 L.Ed.2d at 585. The Court then summarily applied the per se rule and disposed of the case without inquiring into whether the agreement

accomplished any efficiency creating integration among the wholesalers, thus failing to engage in the analysis suggested in BMI.14/

Similarly, in Arizona v. Maricopa County Medical Society, 643 F.2d 553 (9th Cir. 1980), rev'd, 457 U.S. 332, 102 S.Ct. 2466, 73 L.Ed.2d 48 (1982), the Court held that an agreement among physicians to set limits on fees was per se illegal. The doctors in an association voted on the maximum fees they would charge in full payment for services rendered to policyholders of certain approved insurance plans. The Ninth Circuit Court of Appeals felt the plan should be subjected to the rule of reason. The Supreme Court disagreed. The Court apparently abandoned its BMI standards and

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14/ Commentators have approved the result in Catalano while criticizing its economics. See W. Leibler, Antitrust Advisor, 30-31 (2d ed. 1984); P. Arreda, supra n.8 at 33-34.

followed a formalistic approach which indicated that all price fixing was per se violative even if it created efficiencies. Maricopa, 457 U.S. at 351, 102 S.Ct. at 2476, 73 L.Ed.2d at 63. The dissent pointed out the inconsistency between BMI and Maricopa and stressed that the court "must determine whether the procompetitive economics that the arrangement purportedly makes possible are substantial and realizable in the absence of such an agreement." Id., 457 U.S. at 362, 102 S.Ct. at 2482, 73 L.Ed.2d at 70.15/

BMI and Sylvania indicate that even if the IRF literally qualifies as price fixing, it may be subject to the rule of

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15/ One commentator maintains that the Court's position in Maricopa "made it impossible for the majority to articulate a principled explanation of the Court's unanimous decision in [BMI]." W. Liebeler, supra note 14 at 35 (2d ed. 1984). See generally Maricopa, 457 U.S. at 361-67, 102 S.Ct. at 2482-85, 73 L.Ed.2d at 70-73. (Powell, J., dissenting).

reason if it is no greater than reasonably necessary to achieve a legitimate commercial objective (i.e., has a procompetitive purpose), has no substantial anticompetitive impact, and is no broader than necessary to accomplish its procompetitive goals. See United States v. Jerrold Electronics Corp., 187 F.Supp. 545, 556 (E.D. Pa. 1960), aff'd mem., 365 U.S. 567, 81 S.Ct. 755, 5 L.Ed.2d 806 (1961). Thus, if interchange reimbursement could be left to individual negotiation without threatening the existence and functioning of the VISA system, any effort to impose a set fee would be properly categorized as per se unreasonable. The question is whether the restraint is necessary for the existence of the product.

It is equally true that the Sherman Act allows restraints that are necessary to the procompetitive production of a joint

venture's product. "Joint ventures and other cooperative agreements are . . . not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all." BMI, 441 U.S. at 23, 99 S.Ct. at 1564, 60 L.Ed.2d at 18-19; see NCAA, 468 U.S. at ___, 104 S.Ct. at 2967, 82 L.Ed.2d at 84; Multi-List, 629 F.2d at 1368. Such arrangements normally are subject to rule of reason analysis because whatever restraint they impose is ancillary and counterbalanced by otherwise unattainable procompetitive benefits. Maricopa, 457 U.S. at 365, 102 S.Ct. at 2484, 73 L.Ed.2d at 72 (Powell, J., dissenting). A partnership is the best example of such a venture. See BMI, 441 U.S. at 9, 99 S.Ct. at 1556, 60 L.Ed.2d at 9-10. The issue thus posed is whether the IRF, as an element of the cost of doing business, must be set by the joint manufacturers.

According to NaBanco, three distinct markets exist - one each for card-issuing services, merchant-signing services and "IRF-like" interchange services. It argues that the card-issuing banks sell receivables to merchant-signing banks with the issuing banks directly fixing the prices of those sales through their control of VISA's board of directors. It is this conduct that NaBanco characterizes as price fixing and subject to the per se rule.

We agree with the district court, however, that the evidence adduced at the trial instead demonstrates a complex market relationship between "cardholder and merchant demands for the VISA service suggestive of a joint venture." NaBanco, 596 F.Supp. at 1253. This joint enterprise is not subject to per se

scrutiny because it is a necessary element in the creation of efficiency creating integration.

VISA exhibits characteristics of a joint venture, even if its not technically a "joint venture."16/ It is an entity that has partially integrated some functions, such as the IRF, to develop a product - the VISA card17/ - that none of its members could produce individually.

16/ The various VISA members neither share profits and losses nor commingle management functions. Each member also competes actively against other members in a variety of ways. This results in merchant-signing banks competing with card-issuing banks to enroll cardholders. See NaBanco, 596 F.Supp. at 1253.

17/ NaBanco repeatedly stresses that each VISA member, not VISA, issues the individual plastic cards and receives all proceeds from individual transactions. Thus, VISA "produces" no true "product" according to NaBanco.

The VISA product, however, is not the plastic card itself, but the rules and regulations among the various VISA members that thereby create a national payment system. This universal system is the true product of VISA; the plastic card merely embodies that product.

The product, then, "is truly greater than the sum of its parts." BMI, 441 U.S. at 21-22, 99 S.Ct. at 1563, 60 L.Ed.2d at 17. For a payment system like VISA to function, rules must govern the interchange of the cardholder's receivable. The IRF represents one such rule establishing a "necessary" term, without which the system would not function.18/

The IRF is a mechanism by which VISA ensures the universality of its card, not a price fixing device to squeeze out entrepreneurs like NaBanco. NaBanco, however, argues that each VISA member could issue its own plastic card, thereby proving that the IRF is not "necessary" to create the product. This reasoning misses the mark because even if each member could

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18/ Significantly, NaBanco does not challenge any of the myriad other ancillary restraints that VISA imposes to create and protect its product. NaBanco, 596 F.Supp. at 1253.

afford to issue its own card, universality of acceptance - the key element to a national payment system - could not be guaranteed absent prearranged interchange rules. Consequently, the restrain is "a necessary consequence of the integration necessary to achieve these efficiencies." Id. at 21, 99 S.Ct. at 1563, 60 L.Ed.2d at 17. As such, it must be weighed under the rule of reason.

The Civil Aeronautics Board (the CAB), faced with a strikingly similar fact pattern, examined and upheld, under the rule of reason, a fixed-percentage cost-sharing interchange arrangement to reimburse one airline that provided credit card service to passengers flying on a different carrier. See In Re UATP - 1976, 85-11 CAB 2481 (1980). The 1% charge was determined to be a price agreed to among joint venturers, id. at 2504, which "[did] not substantially reduce or eliminate

competition." Id. at 2503. The CAB found that the interchange fee was a "legitimate method of apportioning expenses among" the joint venturers, and that the uniform interchange fee "may very well be necessary to the continued functioning" of the universal payment system. Id. at 2505. Notably, the CAB also required that the plan be modified to provide member carriers with the option of entering into private interchange arrangements, id. at 2506, just as VISA permits its members to bypass the Base II interchange system. See Baxter, supra note 13, at 586.

Another justification for evaluating the IRF under the rule of reason is because it is a potentially efficiency creating agreement among members of a joint enterprise. There are two possible sources of revenue in the VISA system: the cardholders and the merchants. As a practical matter, the card-issuing and

merchant-signing members have a mutually dependent relationship. If the revenue produced by the cardholders is insufficient to cover the card-issuers' costs, the service will be cut back or eliminated. The result would be a decline in card use and a concomitant reduction in merchant-signing banks' revenues. In short, the cardholder cannot use his card unless the merchant accepts it and the merchant cannot accept the card unless the cardholder uses one. Hence, the IRF accompanies "the coordination of other productive or distributive efforts of the parties" that is "capable of increasing the integration's efficiency and no broader than required for that purpose." Bork, The Rule of Reason and the Per Se Concept, 75 Yale L.J. 373, 474 (1966); see BMI, 441 U.S. at 21-11, 99 S.Ct. at 1563, 60 L.Ed.2d at 17; In Re UATP-1976, 85-11 CAB at 2503. The IRF is "reasonably

ancillary to [a] procompetitive, efficiency-creating endeavor [] and therefore not a naked restrain of trade." Multi-List, 629 F.2d at 1365. It is an internal accounting procedure between joint venturers that shifts a portion of the revenues from the merchant-signing partner to the card-issuing partner. See Baxter Deposition, Vol. I, at 59-60. As such, it must be judged under the rule of reason.

We also note that NaBanco asserts that the IRF is invalid because it effects price fixing without procedural safeguards. The basis for this claim is that the VISA board of directors is alleged to act at their whim in setting the IRF without input or challenge from the merchant-signing members. This argument fails because the board is made up of members who both receive and pay the fee. The board can be, and actually has

been, composed of members that handle more merchant accounts than cardholder business, and who therefore represent the solely merchant-signing members' interests because the interest coincides with their own. Given this relationship, the nature of the business ensures that one side will not unfairly take advantage of the other.

In sum, we agree with the district court that in deciding whether a challenged practice is subject to rule of reason or per se analysis, the court must inquire into whether the practice, on its face, always or almost always tends to restrict output or instead is likely to assist the creation of economic efficiency. NaBanco, 596 F.Supp. at 1253. Rigid line-drawing must be avoided and close attention given to procompetitive, efficiency-creating integration that is accomplished as the result of an anticompetitive, yet ancillary, restraint.

We concluded that the district court properly determined that the IRF was not a naked restraint of competition and therefore not per se price fixing proscribed by Section 1 of the Sherman Act.

Applying the rule of reason, the district court upheld the IRF on two separate and independent grounds. First, the court determined that the relevant product market was all payment devices (including cash, checks, and all forms of credit cards) and that VISA did not possess power in that market. NaBanco, 596 F.Supp. at 1256-59. Second, the court found that, on balance, the interchange fee is procompetitive in nature, id. at 1259-61, and reasonably cost related. Id. at 1261-63.

NaBanco takes issue with the district court's findings on four fronts: (1) the IRF is anticompetitive; (2) market power

is irrelevant in a price fixing case; (3) VISA has market power as demonstrated by the fact that its fixed fee denies merchant-signing banks the opportunity to compete effectively on equal terms; and (4) the district court drew from too large a relevant market by including all payment devices.

The rule of reason "condemn[s] every contract, combination or conspiracy which in purpose or likely effect will significantly restrict competition." L. Sullivan, Antitrust Law § 68, at 187 (1977) (emphasis in the original). Applying the rule of reason is a three step process. First, the court must determine the restraint's purpose. Second, the court must identify the likely effects of the restraint. Last, the court must balance the anticompetitive and procompetitive purposes and effects in an

effort to ascertain if the restraint would substantially impede competition. See id. at 187-88.

Whether the court, in applying the rule of reason, must weigh the market power of the antitrust defendant is a curiously confused and uncertain area of the law. Cases can be cited for both sides of the proposition.19/ NCAA presents a particularly difficult and mystifying hybrid approach. "As a matter of law, the absence of proof of market power does not

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19/ Compare Chicago Bd. of Trade v. United States, 246 U.S. 231, 38 S.Ct. 242, 62 L.Ed. 683 (1918)(no market power analysis) and L. Sullivan, Antitrust Law § 69 at 190 (1977) ("perhaps in most" cases Supreme Court does not analyze market power) with United States v. Container Corp. of America, 393 U.S. 333, 89 S.Ct. 510, 21 L.Ed.2d 526 (1969) (Court analyzed possible market power) and The Supreme Court, 1983 Term, 98 Harv.L.Rev. 87, 255 (1984)(the Court "generally requires an inquiry into [the restraint's] nature and their actual effects on the market").

justify a naked restriction on price or output." NCAA, 468 U.S. at ___, 104 S.Ct. at 2965, 82 L.Ed.2d at 89.

Even though the language in NCAA is somewhat cryptic, the Court apparently intended merely to require some competitive justification of certain restraints regardless of market power. See The Supreme Court, 1983 Term, 98 Harv.L.Rev. 87, 260-61 (1984). This case does not fall in a sufficiently similar fact pattern to warrant strict application of the NCAA language. Therefore, in analyzing the competitive advantages and disadvantages of the IRF, market power was a proper and useful tool for the district court.

Having decided that the relevant market is a valid analytic device in this setting, the issue is whether the district court improperly defined that market. The district court held that the relevant

market was "all payment devices," and that VISA's share of that market - 5 percent or less - did not constitute market power. NaBanco, 596 F.Supp. at 1256-59.

Initially, "[D]efinition of the relevant market is basically a fact question heavily dependent upon the special characteristics of the industry involved." Sulmeyer v. Coca Cola Co., 515 F.2d 835, 849 (5th Cir. 1975)(Section 2 monopolization case). The finder of fact normally is presented with voluminous expert testimony and other evidence. In such a situation, its factual findings are accorded great deference. We will not reverse the district court's market findings unless they are clearly erroneous. See id.; Twin City Sport Service v. Charles O. Finley & Co., 676 F.2d 1291, 1299 (9th Cir. 1982) (market findings not disturbed unless clearly erroneous).

The trial court heard substantial evidence that VISA competes in a national market that includes all payment devices.20/ It also heard testimony that the other payment devices were reasonably interchangeable with one another, even though not identical to a VISA card. "Congress prescribed a pragmatic, factual approach to the definition of the relevant market and not a formal, legalistic one."

20/ This market includes VISA, Master Card, so-called "T & E" cards (travel and entertainment cards such as American Express and Carte Blanche), cash, travelers checks, personal checks, merchants' proprietary cards, ATM cards, and check guarantee cards.

NaBanco contends that the market must be defined from the perspective of the injured plaintiff. Appellant's Brief at 49. According to NaBanco the relevant market is credit card processing service. We do not reach this issue since the market in these particular circumstances is the same, whether viewed from the plaintiff s, defendant's, or consumer's perspective.

Brown Shoe Co. v. United States, 370 U.S. 294, 336, 82 S.Ct. 1502, 1530, 8 L.Ed.2d 510, 542 (1962).

The district court's findings of fact concerning the relevant market are supported by substantial evidence and therefore not clearly erroneous. See Anderson v. Bessemer City, 470 U.S. ___, ___, 105 S.Ct. 1504, 1512, 84 L.Ed.2d 518, 528 (1985)("If the district court's account of the facts is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it . . . . Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous . . . . This is so even when the district court's findings . . . are based on physical or documentary evidence or inferences from other facts."); Dorsey v. Continental Casualty Co., 730 F.2d 675, 679 (11th Cir. 1984).

NaBanco challenges the district court's conclusion that the IRF had a net procompetitive effect and therefore is valid under the rule of reason. This claim of error is predicated on NaBanco's assertion that "the district court did not discuss the wealth of evidence establishing the actual anticompetitive effects of VISA's price fixing." Appellant's Brief on Appeal at 44.

In NaBanco's view, the primary anticompetitive effect ignored by the district court is that the IRF restricts competition between proprietary VISA members (those that both issue cards and sign merchants) and purely merchant-signing members. The proprietary members are free to reduce the merchant discount in "on-us" transactions, because they do not have to pay the IRF, and thus can undercut the purely merchant-signing institution that must keep its merchant

discount higher than the IRF. Appellant's Brief on Appeal, at 44-46. NaBanco overlooks the court's findings that the IRF has competitive effects that create efficiencies.

The district court held that VISA introduced sufficient evidence to "establish [] that IRF is necessary to offer the VISA card - a pro-competitive benefit which offsets any anti-competitive effects." NaBanco, 596 F.Supp. at 1265. Evidence during the trial revealed that individual price negotiations are impractical, would produce instability and higher fees, and could result in the demise of the product offered. See Baxter Deposition, Vols. I & II; Baxter, supra note 13, at 586. The court found that viewing the evidence as a whole, VISA's evidence was more compelling on the competitive benefits created by the IRF. NaBanco, 596 F.Supp. at 1263. The

"fundamental economic interdependence" between the card-issuing and merchant-signing banks, id. at 1260-61; Baxter, supra note 13, demonstrates that redistribution of revenues or costs is a must for the continued existence of the product.

The district court balanced the procompetitive and anticompetitive purposes and effects and decided that the restraint did not substantially impede competition. An abundance of evidence was submitted from which the district court plausibly and logically could conclude that the IRF on balance is procompetitive because it was necessary to achieve stability and thus ensure the one element vital to the survival of the VISA system - universality of acceptance. Substantial, plausible evidence also disclosed that VISA is a joint venture-type enterprise in which the IRF acts as an internal control

mechanism that yields procompetitive efficiencies that its members could not create acting alone, and helps create a product that its members could not produce singly. As such, the district court's finding that the IRF is an ancillary restraint that is more procompetitive than anticompetitive is supported by substantial and persuasive evidence.

We hold that the district court's finding that the relevant market is all payment systems, and that VISA does not possess market power in that market, are not clearly erroneous. We also hold that the district court's alternative finding that, assuming VISA does have market power, the IRF is procompetitive is not clearly erroneous.

As a final matter, NaBanco objects to the fact that the trial was held in several segments over a period of a year and a half and claims it was prejudiced by

this interrupted schedule. These pauses in the trial were necessary to accommodate the overloaded criminal docket in the Southern District of Florida, which cases must be given precedence under the Speedy Trial Act, 18 U.S.C. §§ 3161-74. NaBanco complains that this piecemeal process made presentation of its complex, technical evidence very difficult, thereby raising its burden of proof to an impermissible level.

In cases tried to a jury, delays and interruptions can rise to the level of reversible prejudice. See Young & Simon, Inc. v. Merritt Savings & Loan, Inc., 672 F.2d 401,rr56 402 (4th Cir. 1982). This trial, however, was to the court without a jury. The trial judge's comprehensive opinion demonstrates detailed factual findings, well supported conclusions of law and a clear understanding of the case, record and the issues. See Kenmitz v.

United States, 369 F.2d 389, 391 (7th Cir. 1966). NaBanco can point to no errors of any consequence and makes no showing of prejudice resulting from the trial delays. Absent such a showing, there is no error of reversible magnitude.

The judgment of the district court is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 84-5818

NATIONAL BANCARD CORPORATION
(NaBanco), a Florida Corporation,

Plaintiff-Appellant,
versus

VISA U.S.A., INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion January 10, 1986, 11 Cir., 1986, F.2d ____).

(February 18, 1986)

Before JOHNSON AND HENDERSON, Circuit Judges, and Honorable Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama, sitting by designation.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

Supreme Court, U.S.
FILED
SEP 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 86-84

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

NATIONAL BANCARD CORPORATION,

Petitioner,

VS.

VISA U.S.A. INC.,

Respondent.

BRIEF OF VISA U.S.A. INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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17pp

QUESTION PRESENTED

Whether the District Court and Court of Appeals properly held that the rule of reason should be applied to a VISA rule setting an internal cost-allocating fee, when VISA is a joint venture that produces a product that no member alone could produce, and when rules in general, and this one in particular, are necessary to the efficient functioning of the VISA system.

AFFILIATED CORPORATIONS

Pursuant to Supreme Court Rule 28, VISA U.S.A. Inc. states that it is a member of VISA International Service Association, and that tens of thousands of banks and other financial institutions worldwide are members of VISA U.S.A. and VISA International.

TABLE OF AUTHORITIES CITED

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I.

National Bancard Corporation ("NaBanco") seeks certiorari on the hypothesis that the Eleventh Circuit's opinion in this case announced a new rule of antitrust law. But as even a quick review of the opinion reveals, the Court of Appeals engaged in a routine application of established authority to a complex set of facts and affirmed the findings of the District Court made after a lengthy trial. Thus, NaBanco's petition presents no important or novel issue requiring resolution by this Court, which has addressed similar issues in at least three cases since 1979.

The singular premise of NaBanco's petition is that since horizontal price fixing is illegal per se, evidence that a practice enhances efficiency, or even that it is necessary to the operation of

a joint venture is irrelevant. Yet as this Court pointed out in *Broadcast Music, Inc. v. Columbia Broadcasting System*, 441 U.S. 1 (1979) ("*BMI*"), and reiterated in *National College Athletic Ass'n v. Board of Regents*, 468 U.S. 85 (1984) ("*NCAA*"), the label "horizontal price fixing" is a legal *conclusion* (albeit one that carries with it the consequence of per se illegality under Section 1 of the Sherman Act). That label is not applied mechanistically to any practice capable of being so characterized. To the contrary, application of the label "price fixing," with its attendant consequences,

> is not a question simply of determining whether two or more potential competitors have literally 'fixed' a 'price.' As generally used in the antitrust field, 'price fixing' is a shorthand way of describing certain categories of business behavior to which the *per se* rule has been held applicable. [A] literal approach does not alone establish that [a] particular practice is one of those types or that it is 'plainly anticompetitive' and very likely without 'redeeming virtue' .... Thus, it is necessary to characterize the challenged conduct as falling within or without that category of behavior to which we apply the label '*per se* price fixing.'

BMI, 441 U.S. at 9.

What follows, as both the District Court and the Court of Appeals properly recognized, is that the ultimate inquiry under either the per se rule or the rule of reason is the same:

> [W]hether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same—whether or not the challenged restraint enhances competition.

NCAA, 468 U.S. at 104. Considerations of efficiency and necessity plainly are germane to that inquiry.

NaBanco ignores these observations. It offers, instead, a pastiche of quotations wrenched from context and unhinged from any coherent theory of antitrust jurisprudence. It does so in an effort to demonstrate that *BMI* is a bastard-child of the antitrust laws,

which has been all but repudiated by subsequent cases.[1] The consequence, per NaBanco, is that this Court may, indeed must, ignore the detailed findings of the Courts below—findings that NaBanco is wholly incapable of contesting as a matter of fact—that the establishment of rules governing the interchange of "paper" among VISA system members (including the rule establishing a "fee") is not merely procompetitive, but necessary, to the existence and operation of the successful VISA system.

VISA submits that, despite NaBanco's procrustean efforts to demonstrate the contrary, this Court's decisions in *BMI, Maricopa* and *NCAA*[2] reflect a coherent and well-articulated body of antitrust law that requires neither restatement or refinement. VISA submits, further, that this conclusion is admirably evidenced by the decisions of the lower courts in this very case. Far from creating any novel rule of law, the decisions below simply state convincingly why the VISA interchange reimbursement fee ("IRF") is manifestly procompetitive in operation. That being the case, it would be a strange and unwise rule of law that would proscribe it per se and thereby threaten the very existence of the VISA system[3] in the name of furthering federal competition policy.

II.

The antitrust laws have long recognized that effective competition is furthered when competitors are permitted to combine their efforts to produce a product or service that they could not produce at all, or as well, individually. *See, e.g., BMI*, 441 U.S. at 23. Furthermore, where a particular rule or practice of such a venture is essential to its existence or efficient operation, the rule is not unlawful, and certainly may not be proscribed by the mindless application of per se rules. Those general principles, in essence,

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[1] *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980); *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982); and *NCAA*, 468 U.S. 85.

[2] As to *Catalano, see infra* note 17.

[3] As the lower courts found, *see* A-88-90, A-193-194.

describe VISA and the IRF, and explain why the decisions below were, under settled principles, correct.

VISA is a for-profit, membership corporation comprised of more than thirteen thousand financial institutions throughout the United States.[4] The member banks issue cards, contract with merchants to accept the cards as payment for goods or services, or both, as they choose.[5] Together, VISA's members produce a product—the VISA payment service—that none alone could produce; the VISA card is currently accepted worldwide at hundreds of thousands of locations. To produce this service, VISA's members have integrated only to the extent necessary, leaving themselves otherwise free to compete within the VISA system for cardholder and merchant business, and outside the system, in every other area of their operations.[6]

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[4] VISA began as the BankAmericard, produced by the Bank of America. As the trial court found, even Bank of America—one of the largest banks in the country—was too small to operate the system on a large scale. Thus, at a very early date Bank of America began to license the card to other banks. VISA was ultimately formed as a separate joint venture in 1970.

[5] NaBanco's petition is, thus, fundamentally misleading to the extent it suggests that the VISA system is made up of two contending groups, card issuers and merchant-signers, or that IRF is something imposed by one group upon the other. To the contrary, as both lower courts found, VISA members are free to, and generally do, play both roles. The vast majority of VISA's largest members—which account for a very substantial portion of the system's total volume—are actively involved in both issuing cards and contracting with merchants to accept them. Thus, the convenient shorthand, "card issuing" and "merchant" bank, is merely descriptive of a given bank's role in a particular transaction only. From this fact follows an important point: IRF is established by members actively involved on both sides of the business (indeed when the fee was set at its highest level, the VISA Board was dominated by "net" merchant-signing banks).

[6] Joint ventures allow two or more firms to engage in some activity they could not as efficiently perform on their own. The legality of the enterprise is not a function of any particular degree of integration, or any particular configuration. In fact, contrary to NaBanco's suggestion,

Because there are so many VISA members, there generally will be two different banks involved in any given VISA transaction: the bank that issued the card, and the bank that contracted with the merchant to accept it. What necessarily follows from that fact is that there must be a mechanism to provide for the transfer between the two VISA members of the "paper" resulting from the transaction so that the merchant can be paid and the cardholder billed. This process is called "interchange." It is a feature of all multi-party payment systems, including checks,[7] credit cards, automated teller machine ("ATM") transactions, and inter-airline ticketing.

Interchange within VISA, as in other systems, is necessarily governed by rules. At issue in this case is one of these rules: the rule establishing the amount, or fee, that VISA regulations

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Petition at 4, partial integration will generally be more competitive than complete integration, precisely because it leaves the participants free to compete against each other to the maximum extent in nonintegrated activities. *See* Louis, *Restraints Ancillary to Joint Ventures and Licensing Agreements; Do Sealy and Topco Logically Survive Sylvania and Broadcast Music*? 66 Va. L. Rev. 879, 896 n.114 (1980).

[7] Checks, in fact, provide the most common example of interchange. Interchange of checks has been taking place for almost two hundred years, and today occurs pursuant to rules established by the Federal Reserve. One of these rules mandates the interchange of checks at par. The fact that check clearance occurs at par rather than at some other amount (as in VISA, MasterCard, ATMs, etc.) reflects the different economics of the checking system. For example, in the VISA system the card-issuing bank effectively insures both the merchant and the merchant-signing bank against fraud losses, a marked contrast to the rules governing checks. Similarly, one of the historic benefits of open-book retail credit systems (*e.g.*, a Macy's charge account), and a feature also of the VISA system, is the availability of some "free" period in which the customer can pay off his balance in full without incurring any finance charge. The "float" cost of that free period is obviously substantial and is borne by the card-issuing bank. For a detailed discussion of the history of checking interchange, as well as of the economics of four-party payment mechanisms, see Baxter, *Bank Interchange of Transactional Paper: Legal and Economic Perspectives*, 26 J.L. & Econ. 541 (1983).

require the merchant-signing bank to "pay" the card-issuing bank on all VISA transactions that are interchanged through VISA's computer system, known as BASE II.[8] That fee is referred to as the "interchange reimbursement fee" or, simply, "IRF".[9]

IRF serves two principal functions, both of which are essential to the existence and competitive vigor of VISA. First, like the many other rules governing interchange, IRF establishes the certainty of obligation without which the system could not function.[10] Second, IRF is a cost-sharing device designed to right the imbalance of costs and revenues between the merchant and issuing sides of what is, inherently, an interdependent business, thereby enabling the competitively optimal number of VISA transactions to occur. Both functions—ignored by NaBanco—warrant brief explication.

As noted above, interchange cannot take place without rules governing its fundamental terms. IRF is simply one of those rules. The necessity for rules arises from the fact that VISA sales drafts (known colloquially as "paper") are not marketable commercial instruments: only one bank—the card-issuing bank—has any interest in purchasing the paper from the merchant bank because

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[8] Thus, IRF does not much resemble a price: IRF is to VISA as a whole a net "zero," *i.e.*, every IRF dollar received by one member is paid by another; and, IRF is not charged to third parties outside the venture, but is merely an internal mechanism for allocating costs.

[9] Use of the computer system is optional, and paper interchanged by other means is not subject to IRF. Thus, as both the District Court and Court of Appeals found significant, payment of IRF is optional. If paper is interchanged outside of the VISA BASE II system the parties are permitted to establish alternative interchange rules.

[10] To ensure the appeal of the card and to encourage its use, VISA rules require participating merchants (through their respective merchant banks) to accept all validly tendered VISA cards regardless of which bank issued the card, and require the issuing bank to purchase from the merchant bank all sales drafts resulting from one of its cardholders' use of a VISA card. Because of this obligation of "universality," member banks must know in advance what their costs will be. Hence the need for rules.

only it is contractually entitled, or practically able, to bill its cardholder. Without advance agreement on the terms of the "sale," however, the issuing bank could drive whatever bargain it wished.[11] IRF supplies the requisite certainty, by placing a ceiling on the "price" the issuing bank may demand when purchasing paper in interchange.[12]

The second function of IRF is fulfilled by the level at which it is set. IRF operates as a mechanism to allocate the costs of producing the interdependent VISA service and, in that sense, is not a "price" at all. Reallocation of the costs of producing the service is essential because of the interdependence of the VISA system: each cardholder's use of the card must be matched with a merchant's acceptance of it as payment. As a practical and legal matter, banks are able to earn substantial revenues from merchant-side business, where there is little risk and few costs, but little revenue from the issuer side, which bears substantial risk and virtually all the costs.

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[11] In economic terms, this is a classic example of opportunistic behavior by a monopsonistic buyer. The problem arises because of the absence of a competitive market, which causes individually beneficial self-interested behavior to become harmful or potentially destructive to the system as a whole. "Opportunism" and the "free rider" problem have recently come to be recognized as central concepts in economics and, even more recently, in antitrust jurisprudence. *See, e.g.*, O. Williamson, *Markets and Hierarchies* (1975); *Continental T.V., Inc. v. G.T.E. Sylvania, Inc.*, 433 U.S. 36 (1977).

[12] That issuers would take advantage of the system by acting in their own self-interest is not mere speculation, but is based on historical experience. VISA began as a licensing operation of the Bank of America in the late 1950s. Bank of America did not set a fee to compensate the issuer banks for the costs they bore, but required the merchant banks to pay the issuers either the actual or average amounts they received from their merchants. In practice, the merchant banks took advantage of the system in a variety of ways. Unable to earn sufficient revenues to cover their costs, a number of issuing banks threatened to leave the system. As a result, the system was reorganized as a joint venture with a fixed interchange fee. See also Baxter, 26 J.L. & Econ. 541, for an account of similar experiences with check clearance.

As in any other business, the quantity of transactions "supplied" by either side is a function of the costs of producing the service. However, these costs too are interdependent; many of the expenses borne by the card-issuing side demonstrably benefit the merchant side of the business. For example, VISA rules require the card-issuing bank to bear the costs of fraud and float. That benefits the merchant "side" of the business by facilitating and encouraging use of the card.[13]

Because each cardholder's use of the card must be matched by a merchant's willingness to accept the card as payment, and vice versa, the system would not function if the costs of supplying transactions could not be covered by revenues earned. By allocating the costs of the venture with respect to the benefits received, IRF produces an optimal number of VISA transactions, and thus enhances the overall efficiency of this unavoidably interdependent system. Stated in antitrust terminology, IRF is, therefore, output enhancing rather than output restrictive.

Both courts below held that IRF serves these procompetitive purposes. Equally important, they also found that there is no practical alternative to a set fee. It would be both prohibitively expensive and logistically impossible for each card-issuing bank to negotiate with each merchant bank over the "price" at which it would agree to interchange paper. Alternatively, if issuing banks simply announced the price they would charge, many would behave opportunistically, *i.e.*, take advantage of the system by charging too high a fee. Ultimately, merchant banks would either leave the VISA system, switch to card-issuing only, or refuse to pay the excessive fees, thus undermining universality and the attractiveness of the VISA card.

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[13] The methodology for setting IRF was designed by the independent accounting firm Arthur Andersen after studying the costs of the business. The level of IRF is periodically re-evaluated following similar cost studies.

III.

What we have just described was the subject of a nine-week bench trial. At its conclusion, the District Court held that the per se rule against price fixing was not applicable in this case, and that under the rule of reason establishment of IRF was manifestly procompetitive. The Court of Appeals affirmed.

NaBanco's petition does not seriously contest the finding that there is no alternative to a fixed fee,[14] and simply ignores the lower courts' findings on the procompetitive benefits of IRF. Rather, NaBanco proceeds from the simple-minded premise that because VISA is a cooperative effort, it may not set IRF. However, the only way in which that argument makes sense is if both the holding and the logic of *BMI* and *NCAA* are ignored or rejected. What is more, to do so would have the practical effect not only of eviscerating the VISA joint venture, but of casting doubt upon the legality of joint enterprises under the antitrust laws.

In *BMI*, 441 U.S. 1, this Court held that a practice that on its face technically involved "price fixing" did not constitute a per se violation because of its obvious procompetitive or efficiency-enhancing potential. *BMI* involved a challenge to BMI's and ASCAP's practice of selling for a fixed fee a blanket license to use any of the musical compositions in their libraries. The central issue before the Court was whether that practice, involving, as it literally did, an agreement as to price between horizontal competitors, was illegal per se without regard to considerations of efficiency or necessity. The Court held that it was not. Rather, the

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[14] Instead, it weakly offers the suggestion that VISA could mandate interchange at par. But, a price fixed at zero is still a fixed price. NaBanco glosses over this by arguing that in the absence of agreement, the issuing bank would have a "legal obligation" to purchase its cardholder's paper at par. Of course, this makes no sense since the legal obligation arises precisely, and only, from the agreements that establish VISA. Moreover, while checks interchange at par, the economics of the checking system are wholly different from those of VISA. *See supra* note 7.

Court held that in evaluating the potential application of the per se rule it is necessary to determine whether a challenged practice

> facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead [is] designed to 'increase economic efficiency' and render markets more, rather than less, competitive.

Id. at 19-20.

Applying this standard, the Court held that the blanket license in question was not a naked restraint of trade, but a device that enabled the realization of a variety of efficiencies—one that created a "whole . . . truly greater than the sum of its parts . . . to some extent, a different product."[15] Moreover, the Court observed that "joint ventures and other cooperative arrangements are not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all." *Id.* at 23.[16]

NaBanco's petition argues that *BMI* is an isolated and limited exception to the strict per se rule, and that this fact is shown by the subsequent decisions in *Catalano, Maricopa,* and *NCAA.* However, its argument does a serious injustice to those cases and

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[15] NaBanco argues that the VISA card is the product of each individual member and not a product of the venture as a whole. This totally ignores the significance of "universality," without which the system would not be a system. While many banks could produce a credit card, no bank alone could produce a card with the scope of the VISA card, because no bank is big enough to assume a risk of that magnitude. Together, VISA members have created a product that none alone could produce.

[16] Realizing that *BMI* is strong authority against it, NaBanco feels compelled to misrepresent one of its central points. NaBanco claims that the blanket license was validated because the Court viewed individual licenses as a "realistic alternative" to the blanket license offered by BMI. This, they claim, distinguishes BMI from VISA, where there is no real alternative to IRF. However, the Court found the blanket license an efficiency-producing integration precisely *because* individual licenses were not a competitively realistic alternative. 441 U.S. at 20-24.

the coherent scheme of antitrust law that they embrace. For example, in *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982), this Court applied the *BMI* analysis but, on the facts of that case, reached the opposite conclusion. *Maricopa* involved a challenge to an insurance plan established by a group of doctors. The Court properly held the per se rule applicable because the organization did not permit the doctors to sell a product they could not offer separately, and because the doctors offered no reason to support their claim that *they* had to fix the price at which they would collectively sell their services.

NaBanco also would have this Court believe that *NCAA* did not follow *BMI*, when that is precisely what it did. In that case the Court held the NCAA's plan for televising college football games illegal *under the rule of reason*. Despite the fact that the plan involved both an output limitation and a horizontal price agreement, the Court declined to apply the per se rule because the "case involve[d] an industry in which horizontal restraints on competition are essential if the product is to be available at all." *Id.* at 101. The fact that the Court found the NCAA's television plan illegal under the rule of reason does not change the fact that it refused to apply the per se rule for the very reasons articulated in *BMI*.[17]

This case is closer to *BMI* and *NCAA* than to *Maricopa* (let alone *Catalano*). NaBanco's arguments to the contrary ignore the facts as found by the courts below as well as the fair intendment of this Court's recent decisions.[18] Thus, NaBanco persists in

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[17] We are mystified by NaBanco's reliance on *Catalano*, 446 U.S. 643. *Catalano* was a classic price fixing case, involving an agreement among wholesalers to eliminate the extension of credit to retail customers. The procompetitive justifications alleged there are the same justifications rejected for years in per se price fixing cases. The only issue in the case had to do with whether the per se rule applied to a "component" of price as opposed to the price of the product itself. The case has nothing to do with joint enterprise or the kind of analysis implicated by *BMI*, *NCAA*, or *Maricopa*.

[18] The Court has been steadily moving away from application of per se rules to restraints that may accompany efficiency-producing practices.

arguing that the VISA card is a product of the individual member banks and not of the venture as a whole, despite the findings of the courts below that the VISA payment service could not be offered by any individual bank. And it would have the Court view IRF as a device designed by issuers alone to line their pockets, when the VISA Board of Directors, which establishes the fee, includes banks that do a substantial amount of merchant-side business and when the level of the fee is set after consultation with and study by an independent accounting firm.

In sum, the Eleventh Circuit has done no more than apply this Court's decisions in accordance with their well-articulated rationales. NaBanco selects a few isolated passages from its opinion and quotes them out of context in an attempt to show that the decision creates a "new test": "whether [the price fixing] '*potentially* could create an *efficiency enhancing integration* to which the restraint is ancillary.' " Petition at 11 (quoting A-182) (emphasis supplied by NaBanco). It thus suggests that simply by alleging "potential efficiencies" an antitrust defendant can escape per se treatment. But NaBanco misreads, or misrepresents, the Court's opinion. The Court of Appeals was not identifying what a defendant must allege to escape the per se rule, but was correctly explaining the nature of the inquiry that *BMI* requires.[19]

Read in full, the opinion below amply demonstrates that the Court of Appeals both understood and correctly applied the standards enunciated previously by this Court. It held that "VISA exhibits characteristics of a joint venture, even if it is not technically a joint venture," A-192, and that the VISA joint venture had developed a product " 'truly greater than the sum of its parts,' " A-193 (quoting *BMI*, 441 U.S. at 21-22). It went on

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See, e.g., Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) (vertical market division); *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984) (tie-ins); *Northern Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 105 S. Ct. 2613 (1985) (horizontal boycott).

[19] The full sentence reads: "*BMI's* underlying teaching therefore appears to be that courts should look to whether the restraint at issue potentially could create a efficiency enhancing integration."

to hold that interchange rules—of which IRF is only one—are " 'a *necessary consequence* of the integration necessary to achieve these efficiencies [the universality of the VISA credit card].' " A-194 (emphasis added) (quoting *BMI*, 441 U.S. at 21; *see also NCAA*, 468 U.S. at 101-102). The Court of Appeals also held, as did the District Court, that IRF creates efficiencies by functioning as a cost-sharing mechanism: "It is an internal accounting procedure between joint venturers that shifts a portion of the revenues from the merchant-signing parties to the card-issuing parties," A-197, thus allowing the optimal level of VISA transactions.

In summing up its analysis, the Court of Appeals stated that

> in deciding whether a challenged practice is subject to rule of reason or per se analysis, the court must inquire into whether the practice, on its face, always or almost always tends to restrict output or instead is likely to assist the creation of economic efficiency . . . . Rigid line-drawing must be avoided and close attention given to procompetitive, efficiency-creating integration that is accomplished as the result of an anticompetitive, yet ancillary, restraint.

A-198. That is precisely the inquiry mandated by this Court's recent opinions. It is also an inquiry that leads, inexorably, to the conclusion that the VISA IRF is procompetitive. Thus, no further review is necessary to affirm the correctness of the approach taken by the courts below or the decision reached by them.

IV.

For the foregoing reasons, NaBanco's petition for a writ of certiorari should be denied.

Dated: September 29, 1986

Respectfully submitted,

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OCTOBER TERM, 1985

NATIONAL BANCARD CORPORATION,
Petitioner,

vs.

VISA, U.S.A. INC.,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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A. BMI Did Not Reverse Sixty Years of Antitrust Precedent

Characterizing NaBanco's petition for certiorari as "simple minded," Visa tries to sweep aside the sixty years of antitrust precedent proscribing all forms of horizontal price fixing in favor of a new school of thinking which would exalt alleged special economics, market imperfections and efficiencies. (Visa Br. 9). The legal lynchpin for this argument, however, is an erroneous reading of *BMI*[1] as reversing, *sub silentio*, the long established principle that horizontal price fixing is consistently condemned without sojourn into asserted pro-competitive efficiencies. Though glib, Visa's brief actually underscores the importance of granting this petition.

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1. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979) ("*BMI*").

If the law required a factual inquiry every time efficiencies were asserted—as Visa and the Eleventh Circuit would have it—only the most blatant price fixing schemes, in support of which no arguable efficiencies could be imagined, would be *per se* condemned. In all other cases, full discovery and trial would be required to litigate the possibility of efficiencies. Obviously, such an inqury would strip the *per se* rule of vitality and meaning. *BMI* made no such fundamental change in the law.[2] But the Eleventh Circuit decision, labelling critical language in this Court's most recent price fixing decision as "cryptic" and "mystifying," and claiming it is "without clear standards" for analyzing assertedly efficient horizontal price fixing arrangements, threatens to do just that. (A. 186, 201-02). The notion that there is a wide safe harbor—in which horizontal price fixing defendants can argue they are "partially integrated joint ventures" supplying products greater than the sum of their parts, and only fix prices "ancillary to efficiency-enhancing integration" (A. 182, 192-94)—is antithetical to *Maricopa* and all of its predecessors.[3] More-

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2. Indeed, in *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982) ("*Maricopa*"), this Court reversed the Ninth Circuit and declined the invitation of *amici* to fashion such an exception. *Brief of California Dental Service as Amicus Curiae*, at 3, 6.

3. The practical application of the Eleventh Circuit's efficiency exception is best illustrated by the procedural history of this case. NaBanco's motion for summary judgment was denied, it was put to the burden of taking extensive discovery and proving (1) that what Visa suggested in support of its price fixing—potential pro-competitive efficiencies—did not exist, (2) that Visa had market power, (3) that the price fixing was not unduly restrictive of competition, (4) that the price fixing was not fairly necessary to accomplish the asserted potential efficiencies, and (5) that an alternative to Visa's issuer's fee existed which—regardless of whether it was less restrictive of competition—would promote Visa's competitive success in the marketplace at least as well as its price fixing. (A. 83-104). Visa,

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over, such a doctrine, under which numerous arrangements heretofore illegal will now presumably be validated in the name of efficiency, threatens mischief previously unknown in antitrust annals. The substantial benefits of a conclusive presumption, which this Court reconfirmed in *Maricopa*, 457 U.S. at 344-45, would be completely lost.

In sum, the *per se* rule continues to be the law in horizontal price fixing contexts, this Court must correct the Eleventh Circuit's error. Indeed, if there is to be an exception to the *per se* rule against horizontal price fixing (which we submit there should not), it is this Court which should fashion a workable test, preserving the policies of the antitrust laws. The Eleventh Circuit's construction of a standard, which is ripe for abuse, should not be permitted to stand.

B. The Eleventh Circuit's Opinion Is in Conflict With the Decisions of This Court

Visa's suggestion that the Eleventh Circuit's opinion is in harmony with *Maricopa, Catalano, NCAA* and even *BMI* completely disregards critical aspects of those cases.[4]

Footnote continued—

on the other hand, met its burden of escaping *per se* condemnation simply by showing hypothetical supply and demand curves which theoretically purported to illustrate the possible benefits to Visa of a fixed price. (27:44, 55).

The Eleventh Circuit's test is not only inconsistent with *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980), *Maricopa*, and *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984) (*"NCAA"*)—none of which permitted avoidance of the *per se* rule based on potential pro-competitive efficiencies—but ignores the teaching of *NCAA* which places a *"heavy burden* on the defendant" to justify its restraint, including a showing that the challenged practice is narrowly tailored to accomplish legitimate goals. 468 U.S. at 113.

4. For additional discussion of these authorities, see the Petition at 6-13.

Maricopa involved an allegedly *unique* form of health payment mechanism which defendants contended could not exist without a prior agreement among themselves on the maximum amount they would charge for their services. The plan permitted consumers to choose among numerous physicians, enjoy a wide range of medical services and incur lower health insurance premiums, all with the assurance that their bills would be reimbursed in full. 457 U.S. at 351.[5] Despite these claimed efficiencies—not unlike the "universality" and "special economics" considerations Visa asserts here—the Court found the arrangement *per se* illegal.

Visa likewise misapprehends the significance of the Court's ruling in *Catalano*. Defendants there also argued that the elimination of discounts had significant pro-competitive ramifications, including encouraging entry into the industry and reducing concentration. 446 U.S. at 645. The case thus involved much more than the single issue of whether fixing a component of a price constitutes price fixing. (Visa Br. 11 n.17). This Court's summary reversal of the Ninth Circuit decision constitutes a clear rejection of that court's consideration of market impact and, *a fortiori*, the Eleventh Circuit's concentration on efficiencies here.

In discussing *NCAA*, Visa ignores the crucial fact that "[w]hat the NCAA and its member institutions market . . . is competition itself—contests between competing institutions." 468 U.S. at 101. Thus, contrary to Visa's sug-

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5. Contrary to Visa's statement that application of the *per se* rule turned on the specific facts there (Visa Br. 11), *Maricopa* came before the Court on an incomplete record involving limited discovery, thereby requiring that the facts be viewed in the light most favorable to the defendants. 457 U.S. at 336, 342.

gestion, the Court did not decline application of the *per se* rule because of potential efficiencies but rather because a college football game, by its very nature, cannot exist unless there are two participating institutions. *Id.* In the Court's language, "horizontal restraints . . . [were] essential if the product [were] to be available at all." 468 U.S. at 101. That is obviously not the case with credit cards. (*See infra* at 6).

Turning finally to *BMI*, one must first note that Visa has seized upon dictum in the opinion—removed from the case's special facts—as support for its efficiency loophole in the ban on horizontal price fixing. But as NaBanco set forth in its Petition, the case does not go nearly so far. (Petitioner's Br. 8-9 & n.8). Moreover, Visa is plainly wrong when it says there were no alternatives to the blanket license. (Visa Br. 10 n.16). To the contrary, the Court took comfort in the fact that "there was no legal, practical, or conspirational impediment to CBS's obtaining individual licenses; CBS . . . had a real choice." 441 U.S. at 24. That is not the situation here. (Petitioner's Br. 9 n.8; Visa Br. 10 n.16).

All considered, the Eleventh Circuit's test, whether the fee "potentially could create an efficiency enhancing integration to which the restraint is ancillary" (A. 182), is indeed inconsistent with this Court's decisions. In fact, not even the Eleventh Circuit believed its decision was "routine." (Visa Br. 1). Instead, declaring its difficulty with this Court's prior decisions, it boldly tried to fashion its own, new test. Visa's attempt to walk away from that, and to pretend that the Court of Appeals' decision was simply "routine" is, we submit, neither intellectually honest nor helpful to the process.

One final point must be made: Finding little support in this Court's controlling antitrust authorities, Visa has resorted to the well-worn tactic of wrapping the lower court's opinion in "factual findings" as a reason for denying certiorari. Although the relevant facts are not in dispute and mandate that NaBanco's petition be granted,[6] there is a temptation to respond to Visa's picking and choosing of the facts it cites. Succumbing slightly, in the interest of fairness, NaBanco would only point out the following.

(1) Visa's argument that a single bank could not produce "the Visa payment service" which involves multiple banks (Visa Br. 12), is not only tautological, but misses the point. Single entities, including banks, *do* and *have* produced national general purpose credit cards. (Petitioner's Br. 12 n.9). The issuer's fee is therefore not necessary to make such a product available to the public.

(2) Visa's argument that the system cannot effectively function unless issuing banks have agreed in advance on a discount at which they will purchase receivables (Visa Br. 8) fails to address the issue *sub judice*. Certainty of obligation (or as Visa calls it, "universality")—irrespective of whether it would in fact exist in a completely free market—can obviously be achieved without such price fixing.[7] What the Eleventh Circuit has missed, and Visa

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6. Visa's card issuing banks, as horizontal competitors, fix a discount to the face amount of receivables they each purchase from merchant banks, thereby guaranteeing themselves hundreds of millions of dollars in revenue. The issuer's fee thus stands on a completely different footing from other rules within Visa which do not tamper with price, "the central nervous system of the economy." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59; e.g., *NCAA*, 468 U.S. at 101.

7. This is critically important since *NCAA* requires that even a legitimate purpose can permissibly be achieved only

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simply brushes aside as a "weakly offered" suggestion (Visa Br. 9 n.14), is that universality would be achieved by the continuation of the Visa rule requiring each issuing bank to purchase its cardholders' receivables.[8] Like checks, the paper would then interchange at its face amount rather than at a price fixed discount inuring to the benefit of the issuing banks.

Footnote continued—

through means narrowly tailored to its accomplishment. 468 U.S. at 113. *Accord Kreuzer v. American Academy of Periodontology*, 735 F.2d 1479, 1495 (D.C. Cir. 1984); *Los Angeles Memorial Coliseum Commission v. National Football League*, 726 F.2d 1318, 1397 (9th Cir.), *cert. denied*, 469 U.S. 990 (1984); *North American Soccer League v. National Football League*, 670 F.2d 1249, 1261 (2d Cir. 1982), *cert. denied*, 459 U.S. 1074 (1982).

8. Visa's rule simply confirms that pre-existing obligation of the issuing banks to their cardholders. (8:1496; 36:135; 15:180-82; 22:291; Uniform Commercial Code §§ 5-103(1)(a)(b), 5-114).

CONCLUSION

For all the reasons above and in Nabanco's Petition, a writ of certiorari to the Eleventh Circuit Court of Appeals should issue. This case raises serious questions of antitrust doctrine with far-reaching implications in all horizontal price fixing contexts, and places in issue the scope of permissible conduct by the nation's largest credit card corporation.

Dated: October 10, 1986

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